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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA, AND ANTHONY SUTERA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 4947-4978),[1] and the opinion of the district court following a remand for consideration of certain issues relating

[1] "R." refers to the multi-volume, consecutively paginated record certified by the Clerk of the Court of Appeals. The record has not been printed, pursuant to an arrangement made among the parties and the Clerk of this Court when it was contemplated that the case would be argued at the last session of the 1967 term.

to electronic surveillance (R. 4738-4775), are reported at 384 F.2d 889 and 277 F. Supp. 690, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1967 (R. 4979). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including December 12, 1967. The petition for a writ of certiorari was filed on December 12, 1967, and was granted on March 4, 1968. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the requirement first announced in *Katz* v. *United States*, 389 U.S. 347—that non-trespassory electronic monitoring of conversations could not be conducted, consistent with the Fourth Amendment, without a proper warrant—should relate back to control cases then pending on appeal.

2. Whether the district court properly construed and applied the pre-*Katz* law in admitting evidence of petitioners' conversations which were overheard without a physical trespass by means of an ordinary microphone installed next to the crack beneath a doorway separating petitioners' hotel room from another.

3. Whether the district court properly determined after an adequate hearing that the use or attempted use of certain other electronic surveillance equipment in no way affected the instant prosecution.

4. Whether, as alleged by petitioners, a variety of other errors occurred during the course of their trial, and, if so, whether any such errors, considered individually or collectively, warrant reversal of their convictions.

STATEMENT

Petitioners were convicted by a jury, in the United States District Court for the Southern District of New York, under an indictment charging that they and one Herman Conder[2] conspired to import large quantities of narcotic drugs from France and to conceal them in the United States, in violation of 21 U.S.C. 173 and 174 (R. 2537-2540). On August 30, 1966, petitioner Desist was sentenced to imprisonment for a term of 18 years (R. 3789), petitioner Dioguardi for 15 years (R. 3790), petitioner LeFranc for 20 years (R. 3791), petitioner Nebbia for 20 years (R. 3792), and petitioner Sutera for 10 years (R. 3793).[3] The court of appeals affirmed the convictions (R. 4947-4979; Pet. App. 1a-32a).

1. The evidence at trial showed that in July 1965 petitioner Desist, a retired United States Army Major living in Orleans, France, offered $10,000 to one Herman Conder, a warrant officer at a nearby Army base who was about to be reassigned to Fort Benning, Georgia, if Conder would ship a used food freezer to

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[2] The case against Conder was severed prior to trial. Much of the evidence against petitioners consisted of Conder's testimony together with that of various government agents.

[3] Petitioners LeFranc and Nebbia were also fined $5000 each (R. 3791-3792).

the United States as part of his household effects (R. 30-39). Conder agreed, and Desist delivered to Conder's residence a used freezer, in the insulation of which 209 pounds of pure heroin were later secreted (R. 39-49; see R. 65-72, 318-321, 323-325, 329-331, 358-361; Gov. Exhs. 81A-F, 89A-F). In September 1965, before departing with his family for the United States, Conder shipped the freezer along with his other household goods (R. 49-50). In late November, after the freezer had been delivered to the house trailer where Conder was living near Fort Benning, Conder wrote a letter to Desist informing him that the freezer had arrived (R. 52).

On December 11, petitioner Nebbia, a French national, flew from Paris to New York (R. 1427-1428; Gov. Exh. 43). On Sunday, December 12, Desist flew from Paris to New York, telephoned Conder, and arranged to visit him in Georgia at the end of the week (R. 52, 1428-1429; Gov. Exh. 44). On the evening of December 16, Desist met Nebbia in the latter's room in the Waldorf-Astoria Hotel in Manhattan and discussed plans for picking up the heroin in Georgia that weekend. Desist told Nebbia that he first had to fly to Rochester to see "the boss" but would then proceed to Columbus, Georgia (where Fort Benning is located) and meet him there (R. 373-375, 557-560, 568-609). The following afternoon, Friday, December 17, petitioner LeFranc, also a French national, met Nebbia in the same hotel room, told him to rent a car when he arrived in Columbus the next day, and said that he would wait in a Columbus motel while Nebbia would "take care of things" (R. 375-377, 561-563, 611-627).

The conversations in the hotel room were overheard by means of a non-trespassory electronic surveillance (see *infra*, pp. 7-10).

That evening, on a Manhattan street, LeFranc met petitioners Dioguardi and Sutera who had flown to New York from Miami earlier in the day and registered under false names at a Manhattan motel (R. 1015-1018, 1361-1367, 1428). They proceeded together to a bar in a nearby restaurant called Adano's (R. 1017-1019, 1054-1058, 1137-1138). LeFranc there indicated that he would be going to Atlanta the next morning (R. 1057). Dioguardi placed a telephone call during which he stated that he was with the individual who would be leaving for Atlanta the next morning, and that he would see him again, probably on Monday or Tuesday (R. 1139). Dioguardi then returned to the bar and stated that everything was "all right on [his] end" but that several problems remained to be worked out (R. 1059-1060). Sutera added that he and Dioguardi had not yet seen "anything" (R. 1060, 1140). LeFranc said he had explained this to his "friend", who assured him that the "merchandise" was "here already", that all that remained was to "go down there" and "pick it up", and then to make the transfer to Dioguardi and Sutera at a mutually acceptable place (R. 1060, 1140). Sutera proposed that he and Dioguardi accompany LeFranc to Georgia to save him an extra trip, and Dioguardi added that "your friend should trust us more" (R. 1060-1061, 1140-1141). LeFranc replied that "[t]hese transfers are risky business, there is much to lose here and one cannot be too careful, so we must

insist that we do it our way. In the past people have been betrayed, and everything has been lost, even the people" (R. 1061-1063, 1141-1142). He noted that not even he had met his friend's contact (R. 1063, 1142). LeFranc assured Dioguardi and Sutera that once he received the merchandise, he himself would make the transfer to them, adding that he would like to transfer it as soon as possible since he did not wish to hold the merchandise too long (R. 1063, 1142). He suggested that the transfer be made to a car supplied by Dioguardi and Sutera, and specifically urged that it be done at night for added safety (R. 1064, 1142). He would be "much relieved", LeFranc said, after the transfer had been accomplished (R. 1064, 1143). He indicated that he would telephone Dioguardi and Sutera in Miami to arrange further details after obtaining possession of the merchandise, probably on Monday or Tuesday (R. 1141-1142). A short time later, Dioguardi placed a second telephone call from the restaurant and informed the person called that his negotiations that evening involved a "once-a-year deal" (R. 1144). The conversations in the bar were overheard by three undercover agents of the Bureau of Narcotics who were present among the customers (R. 1053, 1057-1065, 1137-1145).

That same evening, Desist arrived in Columbus from Rochester and informed Conder that two men, whom he later said Conder would recognize as Frenchmen, would pick up the contents of the freezer the following day (R. 54-56, 63). The next morning, Saturday, December 18, Nebbia and LeFranc flew

from New York to Columbus via Atlanta and were met at the Columbus airport by Desist (R. 627-630, 1368-1370, 1457-1459). Nebbia and LeFranc rented a car, dropped off Desist in downtown Columbus, and then drove around the Columbus area in a circuitous fashion, stopping at one point to purchase two suitcases and a large foot locker (R. 1371-1385, 1461-1469). That evening they informed Desist that they were postponing the pickup for a day because they suspected that they had been followed that afternoon, and Desist informed Conder of the change in plans (R. 60-62, 1470-1476). The following morning, Desist told Conder to buy some suitcases and pack them with the contents of the freezer, in order that they might be ready when the Frenchmen returned (R. 64-65). Conder purchased four suitcases, added two of his own, and filled them with plastic bags of heroin which he removed from the lining of the freezer (R. 66-72). Later that day, Nebbia and LeFranc met Desist, again surmised that they were being followed, and decided to postpone the pickup for several more days (R. 74-75, 1449-1450). They drove to Atlanta and then flew to New York, where they were arrested the next morning (R. 1566-1569, 1573). At about the same time, Conder was arrested in Columbus and the cache of narcotics was seized (R. 76-78, 318-321, 1490-1492).

2. At an early point in the pre-trial proceedings, the government informed the district court and defense counsel that federal agents had used an electronic device to listen to conversations which had taken place in Nebbia's room in the Waldorf-Astoria

Hotel, and suggested that a hearing be held to resolve any questions concerning the legality of the agents' conduct (R. 3156-3158). At the instance of the district court, the proceedings were begun in the room of the Waldorf-Astoria Hotel from which the surveillance had been conducted, and the eavesdropping equipment was reinstalled by the agents in precisely the same manner as it had been at the time of the surveillance. The agents were sworn and were questioned by both the court and defense counsel (R. 3156-3159, 3206-3226). Thereafter, the proceedings were returned to the courtroom and a two-day evidentiary hearing was held (R. 3373-3786).

The evidence adduced at the hearing showed that on December 11, 1965, petitioner Nebbia registered at the Waldorf-Astoria Hotel and was assigned room 1602 (R. 3447, 3449-3450, 3468-3469). Three days later, on December 14, the Bureau of Narcotics received information that petitioner Nebbia was staying there (R. 3765-3767). That afternoon, four federal narcotics agents arrived at the hotel (R. 3427-3428, 3505-3506, 3746-3747, 3769). Two of the agents, Kiere and Smith, spoke with the manager, asked for the number of Nebbia's room, and requested a room on the same floor as close as possible to Nebbia's (R. 3431-3434, 3505-3507). The manager informed them that the adjoining room, number 1600, was available (R. 3429, 3506-3507). Upon entering room 1600, the agents noted that a door in the wall separated rooms 1600 and 1602. Kiere opened the door in the presence of the other agents and found a second door,

which could not be opened from room 1600, immediately behind it (R. 3438, 3510, 3524). Smith placed his ear momentarily against the second door, heard nothing, then closed the first door (R. 3511-3512, 3525, 3527-3528, 3749). The first door was not opened by the agents again (R. 3524-3525, 3528, 3758).

Late that afternoon, agent Durham of the Bureau of Narcotics arrived at room 1600 with a tape recorder and other electronic equipment (R. 3392-3395, 3423, 3430). Kiere pointed out the doorway leading to room 1602, and stated that there was a second door behind the first (R. 3404, 3415-3417). Durham proceeded to place a small, ordinary microphone against the base of the door in room 1600, with its face tilted toward the three-eighths inch space between the bottom of the door and the top of the door sill (R. 3417-3420). No part of the microphone or any other apparatus extended into or under the first door (R. 3419, 3441). Durham fixed the microphone in place with adhesive tape, and then, in order to minimize its sensitivity to any sounds in the agent's room, he placed a bath towel over the microphone and along the clearance space beneath the door (R. 3211-3213, 3383-3384, 3412; Gov. Exhs. 3, 4).[4] Durham ran a cable from the microphone into the bathroom in 1600, where

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[4] Government Exhibits 1 through 4 are photographs of the recreated installation. Since the exhibits have not been included in the certified record, we are lodging with the Clerk of the Court a copy of the government's appendix in the court below, which contains copies of those exhibits at pages 133a through 139a.

it was plugged into an amplifier which was connected to a tape recorder (R. 3210-3211, 3218-3219, 3383-3384, 3412; Gov. Exhs. 1, 2). The tape recorder could be operated manually, or by a voice-actuated switch which would activate the recorder whenever the sounds entering the microphone reached a certain level (R. 3223, 3225). Any sounds being recorded could be heard simultaneously on a speaker (R. 3215, 3222).

Thereafter, from the afternoon of December 14 through December 18, agent Kiere, who was fluent in French, operated the equipment manually to overhear and record conversations which took place in Nebbia's room, including the conversation between Nebbia and Desist on December 16 and the conversation between Nebbia and LeFranc on December 17 (R. 3214-3216, 3225-3226). During the surveillance, Nebbia's room was never entered by the agents, the second door was never opened, and no equipment was attached to that door (R. 3404-3405, 3424, 3432-3433, 3438, 3441-3442, 3478, 3493, 3514, 3528-3529, 3748, 3756-3758, 3771-3772, 3776).

At the conclusion of the hearing, the district court found that "nothing has been adduced to indicate there was a physical trespass or any basis upon which the evidence should be suppressed" (R. 3778), and that "there was no illegality to the procedures followed by the agents" (R. 3781).[5] The court accord-

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[5] The court specifically found that the electronic surveillance was not in violation of State law (R. 3778-3780; see *infra*, p 38 n. 22).

ingly denied the defense motion to suppress the evidence thereby obtained (R. 3781).[6]

SUMMARY OF ARGUMENT

I

In *Katz* v. *United States*, 389 U.S. 347, this Court held for the first time that non-trespassory electronic monitoring of private conversations was within the purview of the Fourth Amendment, and that warrants must be obtained before initiating such monitoring. Since, two years earlier, federal narcotics agents in the instant case had used a non-trespassory electronic device, without a warrant, to overhear incriminating conversations by petitioners in a room at the Waldorf-Astoria Hotel in New York City, and since the evidence thus obtained had been used at trial, this case must be reversed if the *Katz* requirement is to be applied retroactively.

In five recent cases—*Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293; and *DeStefano* v. *Woods*, No. 559, 1967 Term, decided June 17, 1967—this Court has analyzed the considerations bearing upon the propriety of prospective or retrospective application of newly announced constitutional rules of criminal procedure. Under the approach developed in those cases, the

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[6] The facts relating to the discovery of two other instances of actual or attempted electronic monitoring involving petitioners, are included later in this brief, as a preface to our discussion of this point (see *infra*, pp. 58-59).

Constitution neither prohibits nor requires retroactive effect, but each situation must be examined in three aspects—whether the *purpose* to be served by the new rule will be furthered by its retroactive application, whether government agents had acted in *reliance* upon the prior rule, and whether there would be an adverse *effect* upon the administration of justice if the new rule were held to control past cases. In applying these criteria, the Court has consistently held new rules to be retrospective in effect only where the newly adopted standards relate directly to the inherent fairness of the guilt-determining process at a criminal trial. In each of the above cases, retroactive application of the particular rule in question was found not to be warranted. Using the same criteria, a retroactive application of the *Katz* rule is similarly unwarranted.

The purpose to be served by the rule announced in *Katz* is to prevent law-enforcement agents from electronically monitoring conversations which a subject seeks to preserve as private and reasonably assumes to be private, without first securing judicial sanction. Retroactive application of the *Katz* requirement, however, cannot change the fact that law-enforcement officers, relying on prior law, have in the past used nontrespassory monitoring devices without first obtaining warrants. Also, the deterrent aspect of the rule will not be advanced by making the rule retrospective. Moreover, the *Katz* rule does not serve to enhance "the reliability of the fact-finding process" (*Stovall* v. *Denno*, 388 U.S. at 298) or to avoid the "danger of convicting the innocent" (*Johnson* v. *New Jersey*, 384

U.S. at 728)—the one essential determinative of retrospective application. And the "reliability and relevancy" of evidence obtained by non-trespassory surveillance of course is obvious (see *Linkletter* v. *Walker*, 381 U.S. at 639).

The reliance of law enforcement authorities upon pre-*Katz* law in this area is apparent. The distinction between an electronic eavesdropping which does not involve a physical intrusion into a constitutionally protected area, and an electronic eavesdropping which does involve a trespass, was drawn by this Court in *Goldman* v. *United States*, 316 U.S. 129, and *Silverman* v. *United States*, 365 U.S. 505. See *Lopez* v. *United States*, 373 U.S. 427, 438-439. The lower courts have been uniform in applying that distinction. Only a week prior to the agents' installation of the eavesdropping equipment in this case, this Court denied a petition for a writ of certiorari to review a Second Circuit decision affirming, on the basis of *Goldman*, the propriety of a virtually identical installation by the same narcotics agent. *United States* v. *Bardo-Bolland*, 348 F.2d 316, certiorari denied, 382 U.S. 944. However desirable the change of law which has now taken place, the "operative fact" (*Linkletter* v. *Walker*, 381 U.S. at 636) is that the conduct of the agents, in attempting under the exigencies of the situation to thwart a major importation of pure heroin, in no respect constituted an intentional evasion of a known constitutional standard.

The effect upon the administration of justice of retroactive application of the rule announced in *Katz* would admittedly not be of the same dimension as that presented by the situations involved in *Stovall* or *Johnson*. Electronic surveillance has, however, played a significant role in some cases of major importance. The potential effect upon the administration of justice which would be occasioned by reversals of such cases, even though limited in number, is of no less practical significance than the effect of reversals in a larger number of more routine cases.

Since there is no reason, under the announced criteria, for a general retroactive application of the *Katz* rule, there is similarly no reason to apply it to cases which were pending on appeal when *Katz* was decided. For purposes of retroactivity, this Court, upon thorough consideration of the problem, has held in its recent cases that no distinction is justified between convictions which were final at the time of the pertinent decision and convictions which were then at various stages of trial and direct review. *Johnson* v. *New Jersey*, 384 U.S. at 733; *Stovall* v. *Denno*, 388 U.S. at 300-301; *DeStefano* v. *Woods*, No. 559, 1967 Term, slip op. p. 4 n. 2.

II

Under the law applicable prior to the time of the *Katz* decision, the district court did not err in admitting evidence of the monitored conversations. This Court and lower courts had theretofore sustained, against constitutional challenge, the admissibility of

evidence obtained by electronic surveillance where there had been no physical trespass into a constitutionally protected area. *Goldman* v. *United States*, *supra*; *Silverman* v. *United States*, *supra*; see *Lopez* v. *United States*, *supra*. Here, after a thorough evidentiary hearing during which the electronic equipment was displayed, reinstalled, and explained, the district court found that the monitoring of petitioners' hotel room did not involve a trespass. The evidence plainly supports that finding; the testimony of the agents was clear and uncontradictory, and the character of the recordings is fully compatible with the nature of the installation described by the agents. There was thus no reason to exclude the evidence of the conversations.

III

The hearing held in the district court on remand, following the government's disclosure to the court of appeals of two instances of use or attempted use of electronic equipment with respect to certain of petitioners, other than the Waldorf-Astoria incident, was more than adequate. It clearly showed that in neither instance was any matter overheard which bore even remotely on the instant case. Inter-governmental correspondence and the testimony of numerous agents of the F.B.I. and the Bureau of Narcotics conclusively established that, aside from the Waldorf-Astoria surveillance, only petitioner Dioguardi had been overheard. That had occurred long before the formation of the conspiracy charged in the instant indictment, in a restaurant in Dade County, Florida, when he was talking about matters wholly unrelated to the present

case. In December 1965 Bureau of Narcotics agents had attempted to use an electronic device secreted in a car rented by petitioner Nebbia in Columbus, Georgia, but the device failed to function and the agents heard only static.

The court of appeals was warranted in excluding from the scope of the remand hearing the electronic monitoring at the Waldorf-Astoria since that incident had been thoroughly explored at trial. Although petitioners contend that the hearing was unduly circumscribed in terms of the opportunity afforded them for showing taint, the record, totalling more than 800 pages taken on eight different occasions over a more than one-month period, amply refutes this contention. As indicated, the government's evidence clearly showed that the trial proof was not tainted by the prior occasions of electronic surveillance or attempted surveillance other than the Waldorf-Astoria incident. Petitioners introduced two witnesses with respect to the 1965 Georgia episode, whom the court permitted to testify also as to an alleged illegal (non-electronic) search in Georgia by federal agents. The court's finding that the testimony of these witnesses was not credible is amply supported by the record. While the court declined to permit the defense to call other witnesses, it did so only after considering a proposed "statement of relevancy" with regard to their testimony, and justifiably concluded that to allow the witnesses to be called would convert the proceedings into a "grandiose fishing expedition." In short, the breadth of the hearing was more than sufficient to afford peti-

tioners the opportunity to show that the case against them was the fruit of the poisonous tree; yet such proof was not provided. Far from being unduly circumscribed, the hearing demonstrates the extent that judicial resources may be consumed in the pursuit of groundless claims of taint arising from electronic overhearing.

IV

All of the other points raised and discussed by petitioners relate either to the sufficiency of the evidence or to the propriety of certain discretionary determinations made by the trial court. Each of these various arguments was fully considered and properly rejected by the court of appeals. Viewed either individually or collectively, they would not warrant reversal of petitioners' convictions.

ARGUMENT

I. THE REQUIREMENT FIRST ANNOUNCED IN *KATZ* v. *UNITED STATES*, 389 U.S. 347, SHOULD NOT BE HELD APPLICABLE TO PRIOR TRIALS WHERE RELIABLE EVIDENCE HAD BEEN OBTAINED AND INTRODUCED IN CONFORMITY WITH THE LAW AS IT THEN EXISTED.

In *Katz* v. *United States*, 389 U.S. 347, decided December 18, 1967, this Court held that where a person conducting a conversation which he "seeks to preserve as private" has "justifiably relied" upon the privacy afforded by the place where he is situated—there, a public telephone booth—monitoring of that conversation by law-enforcement agents utilizing electronic equipment, whether or not a trespass is involved, is subject to the requirements of the Fourth Amendment

(389 U.S. at 350-353). Evidence obtained by means of such electronic surveillance can thus be introduced at trial only if a judicial warrant is first secured, upon a showing of probable cause, to conduct such monitoring (*id.* at 354-359). In so concluding, this Court stated that the doctrine enunciated in *Olmstead* v. *United States*, 277 U.S. 438, and *Goldman* v. *United States*, 316 U.S. 129, holding the Fourth Amendment inapplicable where no physical trespass into a "constitutionally protected area" had occurred, "can no longer be regarded as controlling" (389 U.S. at 351-353). In the instant case, at a time two years prior to the holding in *Katz* that the warrant requirement applies despite the "absence of a physical intrusion into any given enclosure" (*id.* at 353), federal narcotics agents investigating unlawful heroin importation engaged in non-trespassory electronic surveillance, without first obtaining judicial authorization, to overhear incriminating hotel-room conversations by petitioners Desist, LeFranc, and Nebbia. Evidence of those conversations was introduced at trial. If the requirement first announced by the *Katz* decision is deemed to control not only future electronic monitoring but past surveillance conducted pursuant to the law as it was then construed and applied, then petitioners' convictions must be reversed. We urge, however, that there is no sound reason for such a result, and that, under the criteria announced by this Court in assessing the propriety of retrospective application of newly announced constitutional standards, application of the *Katz* holding to prior cases is not warranted.

A. There is no reason for a general retroactive application of the Katz requirement.

As an initial matter, it is essential to recall what *Katz* did and did not hold. Under *Katz* the constitutional propriety of electronic surveillance no longer depends upon whether a physical intrusion into a constitutionally protected area is involved. Persons who engage in conversations which they seek and can reasonably expect to preserve as private are entitled to the protections of the Fourth Amendment. But the Court also concluded that electronic surveillance which otherwise would be prohibited might be conducted, consistently with the Fourth Amendment, if undertaken pursuant to a judicial warrant "authorizing the carefully limited use of electronic surveillance" (389 U.S. at 356). Thus, *Katz*, while discarding the criterion of trespass, held only warrantless monitoring, not all monitoring, to be constitutionally infirm.

Decisions such as *Katz* of course reflect the fact that there ~~are in~~evitable developments in the constitutional rules governing the investigation and adjudication of criminality. It is not, however, a logical or necessary corollary to the announcement of each new stage in that development that all past criminal convictions, which had been properly obtained under the law as it previously stood, should be invalidated. Where a new rule does not bear on the integrity of the guilt-determining process as to particular defendants, but is designed essentially to regulate police behavior in the interest of preserving rights of the citizenry as a whole, retroactive application of the new rule is not warranted. Extending many new rules of criminal

procedure to past cases would simply penalize society —by the release of justly convicted criminals—for the failure of law-enforcement officers and lower courts to anticipate the nature and scope of future changes in constitutional law—a function uniquely reserved to this Court. Retroactive application would seem particularly inappropriate where there would almost certainly have been compliance with the new rule had it then existed and been known.

Three years ago, in *Linkletter* v. *Walker*, 381 U.S. 618, this Court for the first time undertook to analyze in a plenary fashion the various considerations bearing upon the propriety of prospective or retrospective application of constitutional rules of criminal procedure. After discussing various cases dealing with statutory changes or decisional overturning of established common-law rules, the Court there concluded that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make [a new] rule prospective" (381 U.S. at 628). It then noted that "there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application" (*ibid.*). Acknowledging that previously and "without discussion," new constitutional rules had been applied retroactively,[7] the Court rejected the view that the "method

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[7] Prior to *Linkletter*, as noted in *Johnson* v. *New Jersey*, 384 U.S. 719, 733, the Court had "applied new judicial standards in a wholly prospective manner," citing *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, and *James* v. *United States*, 366 U.S. 213. Moreover, the Court had

of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication" (381 U.S. at 628-629). Instead, the Court stated its belief "that the Constitution neither prohibits nor requires retrospective effect" (381 U.S. at 629). Continuing, the Court struck the note it was to follow consistently thereafter (381 U.S. at 629):

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by

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previously considered the question of retroactive application of new rules in a variety of non-criminal areas. See, *e.g.*, *Marine National Bank* v. *Kalt-Zimmers Mfg. Co.*, 293 U.S. 357 (negotiable instruments); *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (freight rates); *Fleming* v. *Fleming*, 264 U.S. 29 (contracts); *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (deeds); *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416 (contracts). See generally *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371. Individual members of the Court had also suggested consideration of the question in the criminal procedure area. See, *e.g.*, *Pickelseimer* v. *Wainwright*, 375 U.S. 2, 3 (dissenting opinion); *Griffin* v. *Illinois*, 351 U.S. 12, 20 (concurring opinion).

The cases to which the *Linkletter* opinion referred concerned rules regarding the assessment of the voluntariness of a defendant's confession, the rule that counsel must be appointed to represent an indigent charged with a felony, and the rule that a transcript of the trial must be furnished an indigent for use on appeal (see 381 U.S. at 628-629, n. 13). All of these rules, whether or not developed expressly for such purposes, serve directly to reduce the possibility of an unreliable determination of guilt, or the affirmance of such an unreliable determination. See *Johnson* v. *New Jersey*, 384 U.S. 719, 727-728; *Tehan* v. *Shott*, 382 U.S. 406, 416.

> looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Moreover, the *Linkletter* opinion significantly noted that the prior rule must be considered as "an operative fact and may have consequences which cannot justly be ignored," and that "'public policy in the light of the nature both of the * * * [prior rule] and of its previous application' must be given its proper weight" (381 U.S. at 636, quoting from *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374). Accordingly, the opinion concluded, in deciding whether a new constitutional rule of criminal procedure should be given retroactive or only prospective effect, the particular situation presented must be assayed in three respects—"the purpose of the [new] rule; the reliance placed upon the [prior] doctrine; and the effect on the administration of justice of a retrospective application of [the prior doctrine]" (381 U.S. at 636).

Since *Linkletter*, the Court has, in four subsequent cases, reiterated that a decision announcing a new constitutional rule of criminal procedure may be applied either retrospectively or prospectively, and each of these cases affirmed the necessity of evaluting the situation presented in the above respects. *Tehan* v. *Shott*, 382 U.S. 406, 413; *Johnson* v. *New Jersey*, 384 U.S. 719, 727; *Stovall* v. *Denno*, 388 U.S. 293, 297; *DeStefano* v. *Woods*, No. 559, 1967 Term (decided on June 17, 1968, together with *Carcerano* v. *Gladden*,

No. 941, 1967 Term).[8] In each of these cases, as in *Linkletter*, this Court concluded that, on balance, a general retroactive application of the particular new rule involved was not warranted. In the instant case, applying the same decisional criteria, it is apparent that the same conclusion is justified.

This conclusion is fully supported by this Court's decision in *Roberts* v. *Russell*, No. 920 Misc., 1967 Term, where *Bruton* v. *United States*, No. 705, 1967 Term, decided May 20, 1968, was held to be retroactive in effect. Notably, the Court based its holding on the express ground that the issue involved in

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[8] Petitioners attack the jurisprudential underpinnings of *Linkletter*, and the subsequent decisions holding new constitutional rules non-retroactive, on the ground that John Austin, whose general philosopy was briefly referred to in the *Linkletter* opinion (381 U.S. at 623-624), might not have acceded to the theoretical propriety of a prospective application of judicial decisions interpreting the Constitution, as opposed to the common law, in light of the particular governmental structure existing in this country (Pet. Br. 57-65). While we do not agree with petitioners' analysis, it seems unnecessary to debate the point. Mr. Justice Cardozo once noted, in discussing a possible line of division between the kinds of cases which would be given retrospective application and those which would not (Cardozo, *The Nature of the Judicial Process*, pp. 148-149 (1921)):

> * * * Where the line of division will some day be located I will make no attempt to say. I feel assured, however, that its location, wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetish of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice.

It is clearly with reference to these considerations that the line has now been drawn in this Court's recent decisions.

Bruton went to the inherent fairness and reliability of the guilt-determining process (slip op. pp. 2-3). Moreover, the *Roberts* opinion quotes extensively from *Linkletter*, *Johnson* and *Stovall* in distinguishing from those cases a situation in which the integrity of the trial is at stake. It is of course apparent that the *Katz* rule, involved in the instant case, does not cast doubt upon the fairness or integrity of trials conducted under the prior law.

1. *The purpose to be served by the* Katz *requirement will not be furthered by a retroactive application.* Realistically, the central justification for overturning otherwise proper prior convictions by a retroactive application of a new rule of criminal procedure is that the underlying purpose of the particular rule would thereby be furthered. If, however, the purpose of the rule would not thus be served, there is no sound reason for giving the rule retroactive effect. Hence, in each of the recent cases discussing the factors to be assessed in determining the possible retroactive reach of a new rule, the purpose to be served by the rule is listed in the Court's opinion as the first of the pertinent considerations. Moreover, the Court noted in *Linkletter* not only that it must look to the history and purpose of the new rule in question, and determine whether or not retrospective application will further its operation, but specifically stated that such an approach "is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures" (381 U.S. at 629). The retroactivity issue in the instant case, of course, is one which arises in a Fourth Amendment context.

The purpose to be served by the rule announced in *Katz* is to prevent law-enforcement agents from electronically monitoring conversations which a suspect seeks to preserve as private and reasonably assumes to be private, without first securing judicial sanction for such monitoring. Retroactive application of such a rule, however, cannot alter the fact that such non-trespassory monitoring by law-enforcement officers, in reliance on this Court's decision in *Goldman* v. *United States*, 316 U.S. 129, and *Silverman* v. *United States*, 365 U.S. 505, has already in fact occurred, and that the "ruptured privacy of the * * * [subjects] cannot be restored" (*Linkletter* v. *Walker*, 381 U.S. at 637). Moreover, unlike the situation in *Linkletter*, the sort of individual privacy involved in this case—freedom from non-trespassory overhearing of conversations—was not, prior to *Katz*, even recognized as a matter of constitutional concern.[9] Those whose incriminating conversations were overheard without a trespass had no vested constitutional assurance that their words could not be reached by law-enforcement agents acting without a warrant. Although they were victims of a successful surveillance, they suffered no legally cognizable loss. Certainly "at this late date" no purpose

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[9] As this Court pointed out in *Johnson* v. *New Jersey*, 384 U.S. 719, 731, even prior to *Mapp* v. *Ohio*, 367 U.S. 643, which *Linkletter* held inapplicable to convictions which had become final prior to the date of the *Mapp* decision, "the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf* v. *Colorado*, 338 U.S. 25 (1949). In this regard, see the similar reference to *Linkletter* in *Tehan* v. *Shott*, 382 U.S. 406, 417.

will be served "by the wholesale release of the guilty victims" (*Linkletter* v. *Walker*, 381 U.S. at 637).

Thus, it has been the deterrent aspect of the newly announced rules that the Court has repeatedly emphasized in gauging the propriety of retroactive or prospective application.[10] Quite plainly, that aspect of *Katz* requiring the exclusion of evidence obtained by electronic monitoring without a warrant "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217; *Linkletter* v. *Walker*, 381 U.S. at 633, 635-637; see *Stovall* v. *Denno*, 388 U.S. at 297. Here, as in *Linkletter*, it cannot be said "that this [deterrent] purpose would be advanced by making the rule retrospective" (381 U.S. at 637). Obviously, it

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[10] The opinion in *Linkletter* noted that the purpose of *Mapp* v. *Ohio* was "to deter the lawless action of the police and to effectively enforce the Fourth Amendment" (381 U.S. at 637). In *Tehan* it was pointed out that no single purpose could be attributed to *Griffin* v. *California* (382 U.S. at 413-414), but in *Johnson* the Court observed that in reaching the *Tehan* result it took into account that "the basic purpose of the [no-comment] rule was to discourage courts from penalizing use of the privilege against self-incrimination" (384 U.S. at 727). Even in *Johnson*, where deterrence was not the principal objective of the new rule, the Court noted that "the prime purpose of [*Miranda*] is to guarantee full effectuation of the privilege against self-incrimination" (384 U.S. at 729). Finally, in *Stovall* the Court stated that *United States* v. *Wade* and *Gilbert* v. *California* "fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel" (388 U.S. at 297).

is only through the prospective application of the *Katz* rule that its deterrent effect can be achieved.

More important, and indeed more basic for present purposes, is the fact that the *Katz* rule is not designed to avoid erroneous determinations of guilt, nor does or can it to any significant degree have that effect. See *Stovall* v. *Denno*, 388 U.S. at 297-298; *Johnson* v. *New Jersey*, 384 U.S. at 727-728; *Tehan* v. *Shott*, 382 U.S. at 415-416; *Linkletter* v. *Walker*, 381 U.S. at 639; Note, 16 J. Pub. Law 193, 195-202 (1967). Evidence obtained by electronic monitoring without a warrant certainly is not suspect as unreliable. Indeed, such evidence, if properly authenticated, is of the highest probative value. A rule requiring its exclusion is thus directed solely at discouraging law-enforcement officers from undertaking such monitoring of presumably private conversations without first disclosing their justification to a magistrate, and not in any measure toward "enhancing the reliability of the fact-finding process" (*Stovall* v. *Denno*, 388 U.S. at 298), avoiding the "danger of convicting the innocent" (*Johnson* v. *New Jersey*, 384 U.S. at 728), or averting "a serious risk that the issue of guilt or innocence may not have been reliably determined" (*Roberts* v. *Russell*, No. 920 Misc., 1967 Term, decided June 10, 1968, slip. op., p. 3). Consequently, the argument against retroactive application is in this respect substantially more persuasive here than in the several recent cases where newly announced rules did, to a certain degree, involve "the integrity of the truth-determining process at trial" (*Stovall* v. *Denno*, 388 U.S. at 298), and yet, on balance, were found not to warrant a general

retroactive application.[11] The rule announced in *Griffin* v. *California*, 380 U.S. 609, was denied such general retroactive application in *Tehan* v. *Shott*, 382 U.S. 406,[12] "despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand" (*Johnson* v. *New Jersey*, 384 U.S. at 729). And the rules announced in *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436, were denied retroactive application in *Johnson* v. *New Jersey*, 384 U.S. 719, although a confession of an unrepresented or unwarned suspect may under some circumstances be less reliable than that of an adequately represented individual fully apprised of his constitutional rights. Likewise, the rule announced in *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263, was denied retroactive application in *Stovall* v. *Denno*, 388 U.S. 293, even though presence of defense counsel at a lineup may permit a more meaningful examination at trial as to the basis and accuracy of a witness's courtroom

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[11] In such situations, as the Court noted in *Johnson* v. *New Jersey*, 384 U.S. at 728-729, "whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree" and involves "a question of probabilities" as to which the extent of the protection provided by other established constitutional safeguards is most relevant. To like effect, see *Stovall* v. *Denno*, 388 U.S. at 298, and *DeStefano* v. *Woods*, No. 559, 1967 Term, decided June 17, 1968, slip op., p. 3.

[12] When *Tehan* was decided, however, *Griffin* had already been applied, without discussion, to cases still on direct appeal at the time it had been announced, as had *Mapp* prior to *Linkletter* (see *infra*, pp. 44-46).

identification. Finally, the rules announced in *Duncan* v. *Louisiana*, No. 410, 1967 Term, and *Bloom* v. *Illinois*, No. 52, 1967 Term, both decided on May 20, 1968, were held to have "only prospective application" in *DeStefano* v. *Woods*, No. 559, 1967 Term, decided June 17, 1967, although the Court concluded that "the right to jury trial generally tends to prevent arbitrariness and repression" and that contempt cases "would be more fairly tried if a jury determined guilt" (Slip op., pp. 3, 4).

In each of the above instances, the new rule, unlike those announced in *Mapp* and in *Katz*, possessed at least some potential for enhancing the reliability of the fact-finding process. Nevertheless, this consideration was thought to be outweighed by previous governmental reliance upon the former standards and by the potentially detrimental effect of retroactivity upon the administration of justice. In the present situation, "the reliability and relevancy" of evidence obtained by non-trespassory electronic surveillance is clear (see *Linkletter* v. *Walker*, 381 U.S. at 639).[18] There

[18] Petitioners claim that the "integrity of the fact-finding process" is in fact involved in this case because of asserted acoustical and translation problems with the tapes of the recorded conversations (Pet. Br. 76-77). In so asserting, however, petitioners are plainly confusing a general rule regarding admissibility of a class of evidence with the adequacy of the foundation and the probative value of specific items of evidence in this particular case. (See *infra*, pp. 70-73.) Their contention in this respect thus lacks pertinence with regard to the general question here presented—the retroactivity or non-retroactivity of the *Katz* rule. Moreover, their narrower claim, as it relates to the adequacy of the particular tapes, was considered and properly rejected by both courts below.

is thus no need to weigh the value of the new rule in improving the integrity of the guilt-determining process against other considerations, such as justifiable reliance on prior authority or the number of cases affected. Simply stated, there is no sound jurisprudential purpose to be served by retrospective application of the *Katz* rule. Nevertheless, if reliance and impact are considered, these factors also weigh heavily against the adoption of such an approach.

2. *Law-enforcement officers have justifiably relied on previous judicial decisions holding that no warrant was necessary for non-trespassory electronic surveillance.* It is clear beyond cavil that prior decisions in Fourth Amendment cases had established a body of legal authority, regarding the propriety of non-trespassory electronic monitoring of private conversations, upon which law-enforcement officers were fairly entitled to rely. The distinction between electronic surveillance which does not involve a physical intrusion into a constitutionally protected area, and electronic surveillance which does involve a trespass, was explicitly drawn by this Court in *Goldman* v. *United States*, 316 U.S. 129, and *Silverman* v. *United States*, 365 U.S. 505. As noted in *Lopez* v. *United States*, 373 U.S. 427, 438-439:

> The Court has in the past sustained instances of "electronic eavesdropping" against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, *e.g.*, *Olmstead* v. *United States*, 277 U.S. 438; *Goldman* v. *United States*,

> 316 U.S. 129. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman* v. *United States*, *supra*. * * *

As recently as this Court's decision in *Berger* v. *New York*, 388 U.S. 41, decided only six months prior to *Katz*, the Court gave explicit recognition to this established doctrine. There, the Court condemned the New York eavesdropping statute for allowing, because of its overbreadth, "*a trespassory intrusion into a constitutionally protected area*" (*id.* at 44) and "*a trespassory invasion* of the home or office, by general warrant, contrary to the command of the Fourth Amendment" (*id.* at 64). Indeed, the Court in *Berger* noted that it had "in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices" (*id.* at 63), citing *Goldman*, *Lopez*, *On Lee* v. *United States*, 343 U.S. 747, and *Osborn* v. *United States*, 385 U.S. 323 (see also 388 U.S. at 50-53, discussing these cases). Similarly, the lower federal courts have been uniform in applying the trespass/non-trespass distinction which these cases delineated (see, *infra*, pp. 51-52). Petitioners cite no pre-*Katz* case, federal or state, which failed to adhere to that distinction where an electronic monitoring was involved.

It is thus apparent that law-enforcement agents in the past, when faced with the necessity of either using an electronic monitoring device or allowing a criminal investigation to be effectively thwarted, have relied upon the distinction drawn by the decided cases and used a non-trespassory device. No investigator, given a free choice, would elect to use as crude a moni-

toring means as an ordinary microphone placed against a crack under a door—the method used in the present case. A microphone secreted in the subject's room, or a spike microphone inserted into the wall so as to touch against the opposite surface, would provide far greater clarity and sonic fidelity.[14] Yet to comply with existing law, the simple, non-trespassory method has been employed, and had, until *Katz*, consistently received the expected judicial approval. Indeed, only one week prior to the agents' installation of the equipment in this case, this Court denied a petition for a writ of certiorari to review a Second Circuit decision affirming, on the basis of *Goldman*, the propriety of a virtually identical installation by the same narcotics agents. *United States* v. *Pardo-Bolland*, 348 F.2d 316, certiorari denied, 382 U.S. 944. In that case, agent Durham had taped a small, ordinary microphone against the clearance space beneath a door separating two hotel rooms, just as he later did in this case (No. 521, 1965 Term, II R. 4a-5a, 10a-11a).[15] In each instance, care was taken that there

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[14] The lack of a high degree of clarity in the agents' tapes in this case, which forms the basis of one of petitioner's complaints (see Pet. Br. 122-134, 158-161), was a direct result of the agents' careful compliance with existing law. Nonetheless, the tapes were sufficiently intelligible (see *infra*, p. 70).

[15] Compare the photograph of the microphone installation in that case (Pet. App. C., No. 521, 1965 Term) with that in this case (Gov. Exhs. 3, 4). In *Pardo-Bolland* a microphone was also placed against a keyhole in the common door. At a second hotel, an installation was made with a microphone placed against a small opening in the common wall through which a telephone cable entered the two rooms. Both installations were found non-trespassory, and hence permissible. 348 F.2d at 321.

was no penetration into or under the door; the microphone was simply placed so as to pick up the sounds coming under the door, just as they might be heard by an agent with his ear next to the clearance space. The agents certainly had no cause to anticipate that the same type of installation found constitutionally permissible in the *Pardo-Bolland* case would not be held permissible when employed such a short time later. Although the distinction based upon trespass may have been wisely abandoned, law-enforcement officers should be able to act upon the guidance of a clear line of Federal court decisions—the existence of which must be recognized as an "operative fact" (*Linkletter* v. *Walker*, 381 U.S. at 636; *Tehan* v. *Shott*, 382 U.S. at 413)—delineating specific investigative conduct as permissible. Indeed, how government agents can, as a practical matter, do otherwise is difficult to conceive. Law-enforcement officers cannot reasonably be expected to foresee and anticipate changes in constitutional rules, much less predict when such changes will occur.

Petitioners contend, nevertheless, that in 1965 the coming of the *Katz* holding was foreshadowed by recent developments in this area of the law, and that the agents here thus had no justification for proceeding in their investigation under the assumption that the *Goldman-Silverman* distinction had continuing validity (Pet. Br. 69-70).[16] Although philosophical grounds

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[16] Petitioners further argue that electronic surveillance by law-enforcement officers is inherently "immoral" and a "maximally abhorrent method" of conducting a search (see, *e.g.*,

for finding the distinction outmoded might have been apparent to some lawyers in 1965, it was not then clear by any means that this Court would in fact abandon the concept. The prior holdings of this Court certainly gave no clear forewarnings that the trespass distinction would no longer be followed. Cf. *Johnson* v. *New Jersey*, 384 U.S. at 734.[17] It simply cannot

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Pet. Br. 41, 42). At best, these sentiments have little to do with a correct interpretation of the Fourth Amendment, or with the precise question here at issue: whether *Katz* should be applied retroactively. It is sufficient to say that petitioners' expressed view had never been accepted by this Court, and was only recently repudiated by Congress. Nor has it been given any significant legislative acceptance by the States.

[17] That aspect of *Olmstead* v. *United States*, 277 U.S. 438, which found intangible speech not within the purview of the Fourth Amendment, was admittedly not supported by later cases. *Wong Sun* v. *United States*, 371 U.S. 471, 485-486; *Lanza* v. *New York*, 370 U.S. 139, 142; *Silverman* v. *United States*, 365 U.S. 505; *Irvine* v. *California*, 347 U.S. 128. The trespass distinction, however, continued to be emphasized. Although *Silverman* noted that the Court would not be governed by "technical" considerations of "local property law" or the "ancient niceties of tort or real property law" (365 U.S. at 511), it emphasized that the absence of any "physical invasion" has been a "vital factor" in the Court's decisions in the area (365 U.S. at 510), and then expressly declined to re-examine *Goldman* (365 U.S. at 512), despite the fact that such re-examination "was strenuously urged upon the Court by the petitioners' counsel" (*Katz* v. *United States*, 389 U.S. 347, 370 (dissenting opinion)). Moreover, two Justices concurred in the *Silverman* holding "[i]n view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions" (365 U.S. at 513). *Clinton* v. *Virginia*, 377 U.S. 158, a post-*Mapp* decision applying *Silverman* to the States in a terse,

be said that the *Katz* holding was "clearly foreshadowed" or "fully anticipated" by prior cases (*id.* at 731, 734).

With the general recognition that some means of electronic surveillance—at least in some cases—is one of "the legitimate needs of law enforcement" (see *Katz* v. *United States*, 389 U.S. at 356; *Lopez* v. *United States*, 373 U.S. at 464 (dissenting opinion)), it appeared either that the trespass distinction in some form would have to be maintained, or that a warrant procedure would have to be sanctioned. In view of the hurdles facing the latter possibility—including the requirement of specificity in describing the matter to be seized, the then-extant "mere evidence" rule,[18] and the necessity of notice in executing the warrant—the warrant procedure did not appear with any certainty to be the more likely alternative (see generally *Berger* v. *New York*, 388 U.S. 41). As late as 1967, in fact, counsel for petitioners herein, who was also counsel for Berger, argued as his principal contention in the *Berger* case that "no conceivable system of judicially permissive trespassory or other [non-trespassory] electronic eavesdropping * * * can be constitutional", and developed the argument for some 50 pages[19]

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per curiam opinion, does not serve to advance petitioners' argument.

[18] *Warden* v. *Hayden*, 387 U.S. 294, which abandoned the "mere evidence" rule, was not decided until May 29, 1967.

[19] Counsel therein noted, after reviewing the authorities, that "the interesting conclusion is that no one has yet been

(*Berger* v. *United States*, No. 615, 1966 Term, Pet. Br. 15-64).

In any event, it seems obvious that, for eminently practical reasons, law-enforcement officers must perform their duties within the confines of the law as it stands under the decided cases, not as it might eventually develop. Their actions cannot await judicial resolution of the disparate views of legal theoreticians. They must act upon the exigencies facing them. Their failure to use a currently approved and necessary means of combatting substantial and far-reaching criminal activity because some members in the legal profession question its future viability, would be as much a breach of their public duty as their use of a currently prohibited means on the ground that some lawyers feel its future approval likely. The agents in this case, in conducting the Waldorf-Astoria monitoring, were carefully and conscientiously operating within the bounds of existing law, while attempting to thwart a massive importation of pure heroin before it could be disseminated in this country to do its incalculable harm.[20] Their failure then to second-guess the existing cases permitting non-trespassory surveillance, and thus to take the then-unnecessary step of

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able to propose any means of overcoming the two critical constitutional difficulties"—the "inevitability" that electronic surveillance involves a "general search" and a search for "mere evidence". (*id.* at 44).

[20] It is this aspect of the instant case that makes so incongruous petitioners' characterization of themselves as "victim[s]" and the government agents as "wrongdoer[s]" (Pet. Br. 79).

seeking some sort of judicial warrant[21] authorizing electronic monitoring of the hotel room (presumably by trespassory as well as non-trespassory means), cannot properly be faulted.

Moreover, since the agents' reliance in this case was not simply upon decisions concerning the admissibility of the evidence obtained, but upon decisions construing the lawfulness of the investigation itself, the situation presented here is far more compelling than that which faced this Court in *Linkletter*. See *Johnson* v. *New Jersey*, 384 U.S. at 731; *Tehan* v. *Shott*, 382 U.S. at 417. There, the conduct of the state agents (in first searching the defendant's locked dwelling and office, without a warrant, after he had been booked and placed in jail) was known to be constitutionally forbidden at the time it occurred, and the only question was whether the exclusionary rule announced in *Mapp* v. *Ohio*, 367 U.S. 643, would be given retroactive effect. Although the reliance of the state authorities was not upon the propriety of the means of obtaining evidence, but solely upon the pre-*Mapp* rule that evidence unlawfully obtained was nonetheless admissible in state court trials, retrospective effect was still denied. In the instant case, by way of contrast,

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[21] Petitioners note (Pet. Br. 68) that the record does not show that the agents had probable cause for the surveillance. The government, however, was never put to its proof on this point. It may fairly be presumed that the surveillance was undertaken on something more than an extraordinarily fortuitous guess. Thus, a warrant might well have been obtainable, consistent with the strictures laid down in *Katz*, had the law at that point required this to be done.

the agents' conduct was in no respect an intentional evasion of a known constitutional standard. Nor, it should be noted, did their activities constitute a willful breach of state or local law.[22]

In each of its recent decisions holding new rules of criminal procedure non-retroactive, the Court has emphasized the significance of the fact of reliance by law-enforcement agents on the previously existing law. In *Linkletter*, the Court repeatedly noted that, prior to *Mapp*, "the States relied on *Wolf* and followed its command," and pointed out that "[a]gain and again this Court refused to reconsider *Wolf* and gave its implicit approval to hundreds of cases in their ap-

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[22] Petitioners argue that the electronic surveillance here conducted by the narcotics agents was in violation of New York statutes (Pet. Br. 45, 85-86). The district court, however, at the conclusion of the hearing on the motions to suppress, expressly found that the New York statutes in question did not apply to federal law enforcement agents (R. 3778-3780). That finding was not asserted as error by any of petitioners in the court of appeals, and hence, the question as an independent issue is not now properly before this Court. See *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16. To the extent that the matter bears upon the good-faith reliance of the agents upon the lawfulness of their monitoring, it should be noted that this same issue, involving the same agents, had been discussed and decided in the agents' favor in the *Pardo-Bolland* case over four months prior to the Waldorf-Astoria surveillance. See 348 F.2d at 321-323). There, the court of appeals concluded, for sound reasons, that "[t]he New York statutes involved here * * * do not appear to have been intended to apply to federal law enforcement officers"; "the policing of the activities of federal officers was intended to be left to the federal statute and the supervision of federal courts, which so far have drawn the line at the point of physical trespass" (*id.* at 323).

plication of its rule" (381 U.S. at 637). In *Tehan* the Court extensively traced the history of the rule regarding comment on a defendant's failure to testify, prior to *Griffin*, and noted that "[t]here can be no doubt of the States' reliance upon the *Twining* rule for more than half a century, nor can it be doubted that they relied upon that constitutional doctrine in utmost good faith" (382 U.S. at 417). Again in *Johnson*, the reliance factor was accorded considerable weight. Indeed, the Court explicitly stated that "[l]aw enforcement agencies fairly relied on * * * prior cases, no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*" (384 U.S. at 731). Moreover, the Court in *Johnson* determined that *Escobedo* and *Miranda* would be given "[p]rospective application only to trials begun after the [new] standards were announced" since law-enforcement authorities "have not been apprised heretofore of the specific safeguards which are now obligatory" (*id.* at 732). And in *Stovall* the Court made reference to the weight of "the prior justified reliance upon the old standard" (388 U.S. at 298), and noted that "[l]aw enforcement authorities fairly relied on [the] virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel" (*id.* at 300). Finally, in *DeStefano*, the Court pointed out that "States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States" (slip op., p. 3), and further noted reliance on "the tradition of nonjury trials for

contempts," since "more firmly established," was even "more justified" (*id.* at p. 4). Thus it is clear at all events that the reliance factor has played a significant role in this Court's shaping of rules for non-retroactive application of new constitutional standards. Coupled with a consideration of the purpose to be served by the *Katz* requirement, the element of justifiable reliance argues persuasively for that decision's non-retroactivity.

3. *A general retroactive application of the* Katz *decision would have an adverse effect upon the administration of justice.* As delineated in this Court's opinion in *Stovall*, the third and final factor to be considered is "the effect on the administration of justice of a retroactive application of the new standards" (388 U.S. at 297). We believe that the retroactive application of the *Katz* rule would have marked effect upon the administration of justice, although the impact would not, in volume, be of the same dimension as that involved in the *Stovall* and *Johnson* situations. Instead of a wholesale release of thousands of convicted felons, only a relatively small number would probably be affected, since electronic surveillance has played a part in a limited number of federal cases.[23]

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[23] The difficulty in obtaining evidence by the more common investigation means against major figures in the organized crime field, and the corresponding importance of electronic surveillance in such cases, has been emphasized by the President's Commission on Law Enforcement and Administration of Justice in its report entitled "The Challenge of Crime in a Free Society", pp. 198-199, 201-203, and in the Commission's supplemental *"Task Force Report: Organized Crime"*, App. A, pp. 17-19, App. C, pp. 80, 91-95, 105-106 (1967). See

It should be noted, however, that the matters involved in many of those cases give them a significance to the effective administration of criminal justice in the federal courts beyond that which their number alone might reflect.[24] While occasionally such cases involve a rather insignificant offense (as did *Katz*), most, like the present one, are of far-reaching importance. The quantity of unadulterated heroin seized in this case exceeded 200 pounds—acknowledged by petitioners to be the largest cache ever captured in this country

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Berger v. *New York*, 388 U.S. 41, 95, 113-129 (dissenting opinions). With particular regard to such a need in investigating narcotics importation, see Investigations of the Senate Committee on Government Operations, *Organized Crime and Illegal Traffic in Narcotics*, S. Rep. No. 72, 89th Cong., 1st Sess., pp. 101, 126 (1965). While the use of informants might appear to be a reasonably available alternative to the use of electronic surveillance in the organized crime field, the practical difficulties involved in recruiting, retaining, and using informants are noted in the above report of the President's Commission (p. 198). Moreover, the risk to informants is unconscionably high; between 1961 and 1965, 25 of the government's informants in the organized crime field were murdered. Testimony of former Attorney General Katzenbach, *Hearings Before the Senate Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary on Invasions of Privacy*, 89th Cong., 1st Sess., pt. 3, p. 1158 (1965).

[24] It is impossible to ascertain any accurate figures relating to the amount of non-trespassory electronic surveillance engaged in by State or local officers, and involved in State, as distinguished from federal, criminal litigation. It can be assumed, however, that the amount of such activity has not been insubstantial. Since the *Katz* rule, if applied retroactively, would affect such State convictions and trials as well as those in federal courts, this additional factor should properly be taken into account in assessing the potential affect of holding *Katz* retroactive.

(Pet. 3). Its value, as noted by the court below, was placed as high as $100,000,000 (Pet. App. 2a)—a sum exceeding the gross national product of some member countries of the United Nations (see International Bank for Reconstruction and Development, *World Bank Atlas* (1967 ed.); Steinberg, *The Statesman's Yearbook* 1967-1968, pp. 9-10 (1967)). Yet, the transaction was described by petitioner Dioguardi as a "once-a-year deal" (R. 1144). In the *Pardo-Bolland* case (see *supra*, pp. 32-33), approximately 136 pounds of heroin were involved (see 348 F.2d at 318), which, at corresponding rates, would be worth about $65,000,000. The potential long-term effect upon the administration of justice which would be occasioned by reversals in such major cases, is as weighty a factor as the immediate effect of wholesale reversals in a larger number of more routine cases.

Thus, it seems wholly appropriate to consider the qualitative as well as the quantitative impact of a holding that *Katz* is retroactive.[25] The language of the Court in *Linkletter* bears repeating, particularly since that case, like the present one, involves the retroactivity or non-retroactivity of a rule adopted in the Fourth Amendment context (381 U.S. at 637-638):

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[25] In *Tehan*, it should be noted, only six States had allowed comment on a defendant's failure to testify, yet the Court concluded that "[a] retrospective application of *Griffin* v. *California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*" (382 U.S. at 418). Indeed, in *Stovall* it was noted that the effect of holding *Griffin* retroactive in *Tehan* would have been "insignificant compared to the impact to be expected from retroactivity of the *Wade* and *Gilbert* rules" (388 U.S. at 300).

> Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

This theme was amplified in the post-*Linkletter* decisions holding new constitutional rules non-retroactive. Thus, in *Tehan* the Court pointedly stated that "[t]o require all of those [six] States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration" (382 U.S. at 419). In *Johnson* the Court noted that "retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards" (384 U.S. at 731). Similar views were expressed in the Court's opinion in *Stovall* (see 388 U.S. at 300-301), where the Court regarded "the factors of reliance and burden on the administration of justice as entitled to * * * overriding significance" (*id.* at 300). Finally, in *DeStefano* the Court stated that the effect on the administration

of justice of holding *Duncan* and *Bloom* retroactive would be "significant" and "substantial" (Slip op., pp. 3, 4). Against this decisional background, it seems apparent that the impact of holding *Katz* retroactive is an important and added factor militating against that result, and that the difference in the situations presented is at most one of degree, not kind.

B. Since there is no reason for a general retroactive application of the Katz requirement, there is similarly no reason to apply that requirement to cases which were then pending on appeal.

Where, as argued above, there is no reason for a retroactive application at all, there is likewise no persuasive reason to differentiate between past cases in which the convictions were final on the date of the new decision, and past cases in which appellate review was then still in progress. As the Court succinctly stated in *DeStefano*, its most recent holding on the subject, there is "no basis for a distinction between convictions that have become final and cases at various stages of trial and appeal" (slip op., p. 4 n. 2).

In *Linkletter*, the first of this Court's recent cases analyzing the retroactivity issue, it was noted that the *Mapp* decision had already been applied to cases pending on direct review at the time it was rendered,[26]

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[26] In this particular respect, the fact that *Mapp* involved the Fourth Amendment, as did *Katz*, is not determinative. As this Court has emphasized in discussing retroactivity generally (*Stovall* v. *Denno*, 388 U.S. at 297; *Johnson* v. *New Jersey*, 384 U.S. at 728):

> [T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional

and therefore that the only concern, as a matter of sheer practicality, was whether the decision was to be applied to cases which were then final (381 U.S. at 622).[27] Similarly, in *Tehan* it was passingly noted that the Griffin decision had theretofore been applied to cases which had been pending on direct review when *Griffin* was decided (382 U.S. at 409 n. 3). In *Johnson*, however, this Court for the first time was presented with an open issue as to whether a ruling —that in *Escobedo* and *Miranda*—should be applied prospectively. After determining that, as a general

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rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.

[27] While *Linkletter*, in its general, introductory discussion of retroactivity, had stated that "it appears * * * that a change in law will be given effect while a case is on direct review" (381 U.S. at 627), the cases cited in support involved civil matters clearly distinguishable in nature from the problems existing in *Johnson*, *Stovall*, and the instant case. In *United States* v. *The Schooner Peggy*, 1 Cranch 103, an intervening treaty by its own terms applied to ship condemnation cases not yet final. In *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 23, an intervening statute by its own terms applied to railroad receivership cases pending in any federal court. In *Dinsmore* v. *Southern Express Co.*, 183 U.S. 115, and in *Crozier* v. *Krupp*, 224 U.S. 290, intervening statutes mooted the necessity for the requested injunctive reliefs. In *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, an intervening decision extended employers' liability under negligence law—an area of law in which reliance on prior holdings plays no part in precipitating the action or inaction in question. In any event, the *Johnson*, *Stovall*, and *DeStefano* decisions have settled the issue as it applies to intervening court decisions changing constitutional rules of criminal procedure.

matter, those cases, like *Mapp* and *Griffin*, "should not be applied retroactively," the Court in *Johnson* posed the further question "whether *Escobedo* and *Miranda* shall affect cases still on direct appeal when they were decided or whether their application shall commence with trials begun after the decisions were announced" (384 U.S. at 732). It was next observed that the holdings in *Linkletter* and *Tehan* "were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered," because of the earlier and unconsidered applications of those decisions to cases still on direct appeal *(ibid.)*. It was emphasized that those prior applications had been made "without discussion" and before the general problem had been actively focused upon and dealt with by the Court (*ibid.*; see Schaeffer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. Rev. 631, 644-646 (1967).[28] Continuing, the Court stated (384 U.S. at 732-733):

> All of the reasons set forth above for making *Escobedo* and *Miranda* nonretroactive suggest that these decisions should apply only to trials begun after the decisions were announced. * * * [W]e do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal. Our introductory discussion in *Linkletter*, and the cases cited therein, have made it clear that there are no jurisprudential or constitutional ob-

[28] *Mapp* and *Griffin* of course both antedated the Court's path-breaking decision on non-retroactivity in *Linkletter*.

> stacles to the rule we are adopting here. * * * In appropriate prior cases we have already applied new judicial standards in a wholly prospective manner.

Accordingly, the Court held that *Escobedo* and *Miranda* would be given "[p]rospective application only to trials begun after the [new] standards were announced * * *" (384 U.S. at 732).

When again confronted with a similar "open issue" in *Stovall*, this Court reaffirmed that for purposes of retroactivity "no distinction is justified between convictions now final * * * and convictions at various stages of trial and direct review" (388 U.S. at 300). There, the Court concluded that the same factors which demonstrate the inappropriateness of retroactivity in general "make that distinction unsupportable" *(ibid.)*. Moreover, it should be noted that in *Stovall*—the most recent non-retroactivity decision rendered after briefing and argument—the Court adopted a rule of prospectivity which went beyond that announced in *Johnson*. In *Stovall* the Court held "that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after [the date of the *Stovall* decision]" (388 U.S. at 296). Thus, unlike the *Johnson* rule applying *Escobedo* and *Miranda* to *trials* begun after the dates of those decisions—where interrogations without counsel or without adequate warnings might have been conducted prior to the effective dates of the new rules—*Stovall* held that *Wade* and *Gilbert* would apply only to *identification confrontations* conducted

after the new rule's effective date. Thus, in the evolution of the doctrine of non-retroactivity, *Stovall* reflects the Court's determination that hereafter prospectivity of application, where appropriate at all, means application to future conduct violative of the rule announced.[29]

Petitioners complain, however, that under such an approach, only petitioner Katz, of all the subjects of past electronic surveillances, will benefit from the new requirement, while otherwise they would "stand in full beneficiary * * * enjoyment of the *Katz* rule" (Pet. Br. 54-56).[30] "Enjoyment" of that rule, however, is hardly a matter of right. As pointed out in

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[29] In *DeStefano* the Court held that *Duncan* and *Bloom* would be applied only to trials commencing after the date those decisions were announced. This indicates no retreat from the rule of prospectivity settled upon in *Stovall*, however. Because of the nature of the new rules announced in *Duncan* and *Bloom*—requiring jury trials in State criminal and contempt cases, they admit only of such an application. Indeed, the Court in *DeStefano* stated that *Duncan* and *Bloom* "should receive only prospective application" (slip op., p. 2; see also *id.* at p. 4 n. 2).

[30] Petitioners also seek to impart some legal significance to the fact that the surveillance in *Katz* took place several months prior to the surveillance in this case (Pet. Br. 54). A similar contention was summarily disposed of by this Court in *Linkletter* (381 U.S. at 639):

> Nor can we accept the contention of petitioner that the *Mapp* rule should date from the day of the seizure there, rather than that of the judgment of this Court. The date of the seizure in *Mapp* has no legal significance. It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date.

Stovall, a litigant whose case results in the establishment of a new rule is himself a "chance beneficiar[y]" of that rule, who is accorded its benefit to avoid relegating constitutional adjudications to the status of "mere dictum" (388 U.S. at 301). Where there is no reason for a general retroactive application of a new rule, there is neither any reason to enlarge the group of "chance beneficiaries" to include those who, through accidents of time, are found with their convictions—wholly proper under prior law when rendered—still in the process of appellate review.[31] While recognizing that "[i]nequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue," the Court, in *Stovall*, concluded that "the fact that the parties involved are chance beneficiaries is an insignificant cost for adherence to sound principles of decision-making" *(ibid.)*. Petitioners also seek to invoke the Court's reference to "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law" *(ibid.)* as a reason for

[31] In two recent decisions, the Seventh Circuit has applied the *Katz* holding to pending cases, without discussion or apparent consideration of the propriety of such a retroactive application. *United States* v. *Hagarty*, No. 15881, decided January 11, 1968; *United States* v. *White*, Nos. 16021-16022, decided March 18, 1968. In *Hagarty*, the government filed an unsuccessful petition for rehearing. In *White*, the government, on April 19, 1968, filed a petition for rehearing *en banc* urging that the court of appeals withhold action on the case pending the decision of this Court in the present case.

holding decisions like *Katz* applicable at least to cases still in the process of direct review. It is enough to note that, while the Court did refer to this consideration in *Stovall*, it found it of sufficient importance only to conclude that Wade and Gilbert should be given the benefit of the rule adopted in their cases, and refused to apply the holding in those cases to "litigants similarly situated in the trial or appellate process who have raised the same issue" *(ibid.)*. Moreover, it seems unlikely that the incentive of counsel in individual cases to seek changes in existing law will be significantly dulled by the possibility that another lawyer somewhere has a similar case, raising the same issues, which might ultimately reach decision prior to his case.[32]

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[32] Petitioners' strained effort (Pet. Br. 77-79) to distinguish the instant case on the ground that a federal prosecution is here involved, while in *Linkletter* and its progeny state prosecutions were involved, must fall of its own weight. *Linkletter* and *Tehan* of necessity involved only State prosecutions, for the rules of *Mapp* and *Griffin* had long been adhered to in federal criminal cases. But *Miranda* plainly affected federal as well as State cases, and *Gilbert* was itself a federal case. Yet, no distinction was made, in regard to retroactivity or nonretroactivity, depending on whether the newly announced rule would affect federal as well as State prosecutions. Indeed, in *Linkletter* and *Tehan* the Court acknowledged that the new rules of *Mapp* and *Griffin* had previously been given limited retroactive application to cases on direct review, while in *Johnson* and *Stovall* the new standards were given prospective effect only, although federal as well as State cases were obviously affected. Realization of this fact undercuts any argument grounded on a federal-state distinction in assaying the effect of new rules of criminal procedure, and renders this

II. UNDER THE APPLICABLE LAW PRIOR TO THE TIME OF THE *KATZ* DECISION, THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF THE HOTEL ROOM CONVERSATIONS WHICH HAD BEEN OVERHEARD WITHOUT A PHYSICAL TRESPASS.

A. Under the law applicable prior to the time of the *Katz* decision, the district court plainly committed no error in admitting evidence of the conversations monitored at the Waldorf-Astoria Hotel. As noted above, this Court had previously sustained, against constitutional challenge, the admissibility of evidence obtained by electronic surveillance where the installation of the electronic device did not involve a physical trespass into a constitutionally protected area, *Goldman* v. *United States*, 316 U.S. 129, as opposed to a situation where the installation did involve such a trespass, *Silverman* v. *United States*, 365 U.S. 505. See *Lopez* v. *United States*, 373 U.S. 427, 438-439. The courts of appeals had consistently recognized, upheld, and applied that distinction. See *e.g.*, *Smayda* v. *United States*, 352 F.2d 251, 257 (C.A. 9), certiorari denied, 382 U.S. 981; *United States* v. *Pardo-*

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consideration irrelevant in determining whether such rules should be given retroactive or prospective application.

Petitioners' passing reliance on this Court's supervisory power over the federal courts (Pet. Br. 78), as a reason for holding *Katz* totally or at least partially retroactive, must likewise fail. *Katz* plainly affects state as well as federal prosecutions, and whether it is to be given retroactive effect or not is in no way dependent on the fact that both *Katz* and the instant case are federal in character. Moreover, petitioners present no persuasive reasons why this is an appropriate occasion for application of the supervisory power.

Bolland, 348 F.2d 316, 321 (C.A. 2), certiorari denied, 382 U.S. 944; *Jones* v. *United States*, 339 F.2d 419, 420 (C.A. 5), certiorari denied, 381 U.S. 915; *Cullins* v. *Wainwright*, 328 F.2d 481, 482 (C.A. 5), certiorari denied, 379 U.S. 845; *Anspach* v. *United States*, 305 F.2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Carnes* v. *United States*, 295 F.2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861.

In the instant case, the district court, after a thorough evidentiary hearing during which the electronic equipment was displayed, reinstalled, and explained, specifically found that the monitoring of the hotel-room conversations by the means employed by the agents did not in fact involve any degree of physical trespass (R. 3778-3782). It was "no more a trespass," the court concluded, "than if I were to put my ear against the wall" (R. 3781). Consequently, under the decided cases, there was no reason to exclude evidence of petitioners' conversations.[33]

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[33] Petitioners asserted for the first time in the court of appeals, and now assert before this Court, that by placing an ordinary microphone next to the clearance space beneath one of two doors separated by an airspace there is created, in effect, a parabolic microphone (Pet. Br. 92-93). The argument is predicated upon a misunderstanding either of the operation of a parabolic microphone or of the physics involved in the installation here employed; it is drawn from the language of a self-styled electronic eavesdropping "expert" in an affidavit filed with the court of appeals in support of an unsuccessful motion to reexamine the tape by means of electronic test equipment as well as by ear. In any event, whatever name petitioners choose to apply to the agent's monitoring equipment, the only matter of legal relevance is the fact that the

While recognizing the above "widely held view concerning the pre-*Katz* Federal case law on electronic eavesdropping" (Pet. Br. 118), petitioners argue that the trespass distinction was eliminated in *Osborn* v. *United States*, 385 U.S. 323, and that "*Osborn* one year before *Katz*, laid down the same principle as in *Katz*, * * * namely, that the Fourth Amendment applies to 'non-trespassory' electronic eavesdropping" (Pet. Br. 121). This is an unwarranted interpretation of the *Osborn* holding. There the Court noted that a covert recording by a participant to the conversation was involved, not a surveillance by a third party, and that "[u]nless *Lopez* v. *United States*, [373 U.S. 427] is to be disregarded,

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use of the equipment involved no physical trespass of any degree. Petitioners' more general assertion, that such a structure containing an airspace is designed to assure privacy and yet was here utilized in a manner which in fact enhanced the effectiveness of the monitoring (Pet. Br. 94-95), similarly lacks evidentiary support. The *Pardo-Bolland* case, in which there was a single door between the two rooms, demonstrates the immateriality of an airspace to the functioning of such equipment as was here employed. The assertion also lacks relevance in law. Certainly there is no reason to accord an airspace separating two doors any more legal significance than an airspace between the studs separating the exterior surfaces of a wall. See *Goldman* v. *United States*, 316 U.S. 129. Moreover, petitioners' elaborate effort to distinguish the method of monitoring employed here from the closely parallel situation involved in *Pardo-Bolland* (Pet. Br. 91-96), is wholly unconvincing (see *supra* pp. 32-33). Finally, what legal significance petitioners seek to attach to the fact that hotel officials cooperated with the government agents here, and to the possibility that the hotel's electric current might have been used to operate the monitoring equipment (Pet. Br. 95-96, 99), is difficult to understand.

therefore, the petitioner cannot prevail" (385 U.S. at 327). The Court went on to note, however, that it need not rest its decision upon the *Lopez* holding, since the antecedent judicial authorization for the recording which had been obtained during the investigation of Osborn comported with the Fourth Amendment requirements as viewed and expressed in both the concurring and dissenting opinions in *Lopez* (*id.* at 327-331). This is far from announcing a holding that, contrary to *Goldman*, the Fourth Amendment is thereafter to be considered applicable to instances of non-trespassory surveillance. In any event, whatever argument may be made concerning the effect of *Osborn* upon the trespass distinction to which prior cases had adhered, there is no more reason to find *Osborn* retroactive than there is to find *Katz* retroactive. *Osborn*, like *Katz*, was decided while the present case was pending on appeal.

B. In addition, petitioners attack the sufficiency of the evidence to support the district court's finding that there was no trespass. They contend that discrepancies appear when the testimony of the various agents is compared, and that the question thus arises "whether the agents told the truth at all" (Pet. Br. 97-102). Evaluation of credibility, of course, is a matter for the trier of fact. In any event, there is nothing in the record to support petitioners' argument. The testimony to which petitioners refer is that concerning the opening of the door on the agents' side of the connecting doorway between rooms 1600 and 1602. While petitioners seek to suggest that the testimony was contradictory and evasive, the record

references set forth in their argument fail to support either their specific or their general contentions. The record of the hearing, specifically including the portions cited by petitioners, shows that only the door which opened from the agents' room was opened; that that door was opened only once, immediately after agents Kiere, Smith, Weinberg, and Klempner first entered the room; that it was closed a minute or so later; and that the existence of the second door was later related to agent Durham after he arrived at the hotel with the electronic surveillance equipment (R. 3404, 3415, 3417, 3438, 3510-3512, 3524-3528, 3748-3749, 3758).[34] There is similarly no basis for petitioners' related contention, that the testimony as to the location of the electronic installation is impugned by agent Weinberg "who swore that he had seen no electronic apparatus in the agents' room at all" (Pet. Br. 102). The portion of the record cited by petitioners in support of the quoted statement shows that agent Weinberg in fact testified that he had seen no such equipment in the room when he first entered with the other three agents prior to agent Durham's arrival (R. 3769-3771), or when he returned half an hour or so after he had first entered (R. 3771-3774), but that, when he thereafter visited the room again, he observed the towel along the bottom of the door-

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[34] Agent Durham's absence when the door was opened of course explains why he testified that he never saw the door opened, contrary to petitioners' intimation that his statement in this respect is contradictory and suspicious (see Pet. Br. 100-102).

way, the wire leading from it, and the tape recorder (R. 3772-3773).[35]

Petitioners further contend that, contrary to all the testimony at the pre-trial hearing, the microphone must have been located in petitioner Nebbia's room rather than the agents' room, because, if located in the latter, the microphone would have picked up sounds of the agents using their short wave radio, telephone, typewriter, and tape playback mechanism, yet no "perceptible amount" of such sounds was recorded by the sound-actuated tape recorder (Pet. Br. 103-104). This contention is fully answered by the record. The microphone, which was placed next to the floor on the agents' side of the first door, was shielded from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel (R. 3211-3213; Gov. Exhs. 3, 4). Moreover, instead of being set for automatic operation by means of the sound-actuated switch, the recorder was oper-

[35] Petitioners also seek to impugn agent Durham's credibility by arguing that the particular model of microphone used in the surveillance was of an impedance which would not have worked with the tape recorder (Pet. Br. 98). This argument has no foundation in the record; it was made for the first time in the court of appeals and is based upon the affidavit filed by petitioners' electronic "expert." Moreover, the basis for the argument is in fact erroneous. Whether the resistance of the microphone was 1700 ohms or 1000 ohms, it was still of an impedance which would work well with the recorder. In any event, agent Kiere, who operated the equipment during the surveillance, testified that the separate amplifier was connected between the microphone and the tape recorder at all times (R. 3218-3219; see R. 3210-3211), thus rendering immaterial the question whether the microphone by itself properly matched the input of the recorder.

ated manually by agent Kiere whenever he wanted to make a recording (R. 374, 658-661, 669-670, 3215-3216, 3225-3226), and the door to the bathroom was kept closed on those occasions (R. 373, 668-668a, 3215-3216). Finally, the short-wave radio, typewriter, tape playback mechanism, and generally the telephone, were used before and after, but not during the recordings of conversations (R. 700, 702-704, 857-858, 930-932). In the few instances where the telephone was used during a recording the tape contained noises evincing such use (see, *e.g.*, R. 594-595, 620, 660).

In view of the above evidence, there is plainly no reason to question the district court's finding that the electronic surveillance did not involve a physical trespass. Correspondingly, there was no reason for the court of appeals to have ordered a second hearing on the Waldorf-Astoria monitoring at the time it remanded the case for a hearing on other instances of electronic surveillance (see *infra*, pp. 59-60).[36]

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[36] Petitioners' argument (Pet. Br. 114-117) concerning the President's policy directive of June 30, 1965, affords no reason for excluding from evidence the hotel room conversations overheard in this case. Whatever the validity of their argument that evidence secured in contravention of executive policy should not be admissible, the overhearing in this case, as we have noted previously, involved no impropriety under existing law. See Memorandum for the United States, in *Kolod* v. *United States*, No. 133, 1967 Term; Supplemental Memorandum for the United States in *Schipani* v. *United States*, No. 504, 1966 Term; Supplemental Memorandum for the United States in *Black* v. *United States*, No. 1029, 1965 Term. In none of these cases did the government take the position that non-trespassory electronic surveillance was inconsistent with governmental policy. No question of the nar-

III. IT WAS PROPERLY DETERMINED, AFTER AN ADEQUATE HEARING, THAT THE USE OR ATTEMPTED USE OF ELECTRONIC EQUIPMENT WITH RESPECT TO CERTAIN OF THE PETITIONERS IN NO WAY AFFECTED THE INSTANT PROSECUTION.

A. Following the argument of this case in the court of appeals on January 19, 1967, the United States Attorney, in response to a letter from the Clerk of the Second Circuit, informed the court on April 27 that there had been two other instances of use or attempted use of electronic surveillance equipment with respect to petitioners, apart from the Waldorf-Astoria surveillance, but that in neither had any information been obtained which affected this prosecution (R. 4777; see Pet. Br. 109-110 for text of letter).[37]

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cotics agents in the instant case acting *ultra vires*, as petitioners asserts, is thus presented.

[37] Previously, on February 15, 1967, the United States Attorney had written to the panel advising them that review had been undertaken with regard to this case, but that no eavesdropping had been discovered which in the government's view was arguably material to the case. Following a defense motion challenging the adequacy of the government's disclosure of February 15, the court of appeals requested a "clarification" of the United States Attorney's letter. The letter of April 27, 1967, followed. Before the trial, the Assistant United States Attorney had represented that he knew of no eavesdropping in relation to the case other than the Waldorf-Astoria incident (R. 3157-3161). The letter of the United States Attorney (Pet. Br. 89-90) stated that his office had been unaware of either of the incidents revealed in the letter until a review by the Department of Justice brought them to light following the trial. The district judge specifically found that this was so (Pet. App. 45a-46a). Accordingly, petitioners' repeated references to obstructive and evasive tactics by the government in making disclosures of electronic monitoring

One had taken place in Columbus, Georgia, on December 18, 1965 (shortly before petitioners' arrest), and had provided no evidence of any kind since the equipment malfunctioned. The other had occurred between April 25, 1962, and April 1, 1963, before the formation of the conspiracy here involved, in a restaurant in Dade County, Florida, and had resulted in the overhearing of conversations of petitioner Dioguardi involving matters wholly unrelated to the instant prosecution (Pet. App. 34a-37a). On May 29, 1967, the court of appeals remanded the case to the district court for a "prompt and full" hearing limited to the two instances of electronic surveillance disclosed in the United States Attorney's letter. Petitioners moved for a modification of the order to require the hearing to cover any and all electronic surveillance which may have related to this case, including the Waldorf-Astoria incident. On June 14, 1967, the court of appeals issued an order enlarging the scope of the hearing to cover all instances of electronic overhearing which may have affected this case, but excepting the Waldorf-Astoria incident.

Petitioners contend (Pet. Br. 89) that the exclusion of the Waldorf-Astoria eavesdropping from the remand hearing was error. Since, however, the matter had already been thoroughly canvassed at trial (see *supra*, pp. 7-10), the court of appeals had every

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involving them (*e.g.*, Pet. Br. 110) are unwarranted. It is only after the review procedure described in our *Schipani* memorandum (see note 36, *supra*) had been instituted that the other instances were discovered, and both of them turned out to be wholly immaterial.

reason to conclude that no useful purpose would be served by repitition.

B. The disclosure by the United States Attorney showed on its face that the two instances of overhearing or attempted overhearing had resulted in no evidence which tainted this case. After a lengthy hearing on eight different days between June 17 and July 25, 1967, resulting in more than 800 pages of transcript (R. 3912-4736), the district court found this to be fully confirmed.

1. The first instance of monitoring disclosed by the government occurred between April 25, 1962, and April 1, 1963, long before the formation of the conspiracy charged in this indictment. The overhearing was directed at one Tony Ricci and was effected by a device installed by trespass in the Casa Maria Restaurant in Dade County, Florida (R. 4321-4322).

At the district court hearing, there was considerable testimony as to the manner in which records of this overhearing were taken and kept. Conversations were monitored by clerks at the F.B.I. office in Miami and recorded on daily logs. When the matter overheard appeared to be irrelevant, only handwritten notes were taken and the items were summarized on the log sheets. The clerks were instructed to resolve doubts in favor of relevance. Relevant conversations were tape-recorded. The tapes were replayed and the clerks, using both the tapes and their handwritten notes, attempted to obtain a verbatim transcript of the conversation which was entered in the log. As soon as the log sheets were prepared, the handwritten notes were destroyed. The tapes were kept for a pe-

riod of seven days and then erased (unless a special request was made to retain them longer), so that they would be available for reuse. All tapes relating to the Casa Maria installation had been erased in normal course (R. 4040, 4071, 4073, 4104-4106, 4112, 4161, 4324, 4326, 4339).

The log sheets covering the entire period of the electronic surveillance (Gov. Exh. 100) were turned over to the judge for *in camera* inspection. The trial judge found, as the government had represented, that only petitioner Dioguardi, of all the defendants, was at any time overheard (Pet. App. 44a; R. 4118, 4243). A separate exhibit (Gov. Exh. 103) was prepared of all conversations which possibly pertained to Dioguardi, and a copy thereof was furnished to defense counsel five days prior to the taking of any testimony and again during the hearing (see R. 4026-4028; Pet. App. 45a). They showed that Dioguardi had been overhead talking about the operations of Ricci's restaurant. The F.B.I. agent in charge of the Casa Maria surveillance (agent Swinney) testified that the Ricci investigation never led to an investigation of Dioguardi (R. 4345-4346).

Petitioners complain because they were not shown the complete logs of the Ricci surveillance. However, the surveillance, conducted before the formation of this conspiracy, was obviously irrelevant to the present case. It was only because Dioguardi's voice was picked up that the government had the duty to make any disclosure at all. Petitioners were clearly not entitled to read what had been said about other matters by other persons who were not involved in the present

case. The task of determining whether any of the present defendants other than Dioguardi had been overheard, and whether there were any conversations of his other than those disclosed, was a mechanical one in which defense counsel could be of no assistance to the court. There was thus no reason for the court to turn over all the logs. In this regard, nothing in this Court's *per curiam* opinion in *Kolod* v. *United States*, No. 133, 1967 Term, announced January 29, 1968, requires that a different precedure be followed. At most, that decision requires that records of all conversations involving a monitored defendant be made available to defense counsel so that an adversary proceeding on the question of taint might be conducted. That requirement was amply complied with here.[38]

2. With regard to the attempted overhearing on December 18, 1965, the government's evidence revealed that Bureau of Narcotics agents installed an electronic transmitting device in an automobile which they knew petitioner Nebbia had arranged to rent from the Avis rental agency in Columbus, Georgia. The agents in another car equipped with a receiver followed that car (in which were present, at various times, petitioners Nebbia, Desist, and LeFranc) from noon to midnight on December 18, 1965. However, the device failed to function properly and the agents heard nothing but sporadic static (R. 4190-4194, tes-

[38] Moreover, *Kolod* is still pending before the Court on the government's motion for modification, restored to the calendar on June 17, 1968, for reargument at the 1968 Term.

timony of agent Kiere; R. 4595, 4609-4610, testimony of agent Matuozzi; R. 4679, 4689, testimony of agent Waters). Correspondence between the Department of Justice and the Bureau of Narcotics, reflecting the fact that nothing had been overheard during the attempted December 18 surveillance of the rented car, was turned over to defense counsel (R. 4595-4596, 4600; see Pet. App. 49a-50a, for text of correspondence).

Allegedly in relation to this issue, petitioners offered the testimony of Mr. Kennington and Mr. Brown, the day and night managers, respectively, of the Black Angus Motel in Columbus, Georgia during December of 1965 (R. 4387-4388, 4460). Petitioner Desist registered at this motel on December 17, 1965. Bureau of Narcotics agents Waters and Selvaggi registered the following day (R. 4389, 4410, 4694). Kennington testified that on December 20, 1965, agent Waters invited him to his room to observe the narcotics which the agents had seized. While in the room with several other persons, Kennington testified he had conversation with a man (presumably an agent) whom he could not identify. In response to Kennington's question as to how the narcotics were smuggled into the United States, the unknown person replied: "It was brought in in a deep freeze * * * and on the way down from Atlanta, we kept in touch with him through conversation" (R. 4465-4467, 4472, 4480). Defense counsel asked if the person had said how the agents acquired this information, and Kennington answered "no" (R. 4474). Defense counsel then showed Kennington his written statement, given the day be-

fore to one John Broady, petitioners' investigator. Asked whether his written statement had refreshed his recollection, Kennington replied (R. 4480): "Well, the only thing I could say that they said they got a lot of information following them around, and that is as definite as I can speak." When Kennington resumed the stand following the luncheon recess, he stated that he wished to "retract" a portion of his testimony. He then testified that he heard the agents say "they had a transmitter in the car, but they were not talking to me directly" (R. 4490-4491, 4493). When the court queried Kennington about his inconsistencies, he replied (R. 4493-4494): "Well, I am a little confused, sir."

Brown, who testified mostly as to other matters (see *infra*, pp. 65-66), at one point in his testimony stated that, while at the switchboard on December 18, 1965, he overheard a conversation to the effect that the agents could "hear from one car to the other" (R. 4421-4422).

The district judge found that the testimony of Kennington and Brown was marked by inconsistencies and confusion and was not believable when viewed against the government agents' straightforward testimony and the correspondence indicating that no conversation among any of the petitioners had been overheard during the automobile surveillance on December 18, 1965 (Pet. App. 57a, 51a). His findings in this regard are clearly supported by the evidence.

3. Although the scope of the remand hearing was limited to instances of electronic eavesdropping, the trial judge permitted Brown to give testimony re-

garding two other incidents of alleged illegal invasion of petitioner Desist's rights. Brown testified that on December 19, 1965, between 7:00 and 9:30 p.m., Desist received a telephone call. Pursuant to the agents' prior instruction to summon them if Desist received any telephone calls, Brown summoned agent Waters and handed him the phone. Brown testified that the conversation evidently ended when Waters took the phone and that Waters held the phone only a "few short seconds" (R. 4425-4426, 4455; see R. 4440). The conversation, it should be noted, was in French (R. 4426). On cross-examination, Brown evinced uncertainty as to when this alleged incident had occurred. He testified that he believed it had taken place in the morning of December 19, rather than the evening, as he had earlier testified. When shown a copy of his prior statement to Mr. Broady, petitioners' investigator, Brown testified that the incident had occurred in the evening (R. 4447-4449, 4452).

Brown also testified that on December 18, 1965, he gave agent Waters the key to Desist's motel room and watched the agents go to the building which contained it, although he did not see them enter the room. They came back after a minute or a minute and a half and returned the key, saying, according to Brown, that "he is our man" (R. 4413-4414). Defense counsel twice asked Brown if the agents had stated that they had examined the contents of the room and Brown answered "no" (R. 4430-4431). When defense counsel showed Brown his prior written statement to Mr. Broady, Brown then testified that he recalled the agents saying that they had examined the contents

of the room (R. 4431-4432). Brown stated, after answering, "you see, I am old. I have to think a lot" (R. 4433). Brown admitted on cross-examination that petitioners were paying his plane fare, hotel bills, meals, and his claimed daily earnings of $50 as a self-employed insurance salesman (R. 4450).

Agent Selvaggi testified that Brown, without being requested, gave Waters the key to Desist's room. The agents never used the key and returned it after some hours (R. 4697-4699). Waters testified that he did not ask Brown for Desist's room-key and never entered his room (R. 4671).

In these circumstances, the district judge was amply justified in finding that Brown's testimony did not "rise to the level of credible evidence" (Pet. App. 51a).

C. The length of the hearing on remand in itself refutes petitioners' contention that they were foreclosed from making legitimate inquiry into the circumstances of the electronic monitoring incidents. During the period from June 7 to July 25, 1967, petitioners were granted numerous continuances to enable them to pursue an independent investigation (R. 3923-3924, 3945, 3960-3963, 3972, 3981-3982, 4007-4008, 4199-4201, 4211-4212, 4229, 4231, 4239-4242, 4369, 4377, 4379, 4581-4584). As noted above, they were afforded access to the pertinent government records (Pet. App. 44a-51a); they examined and cross-examined the government agents involved; and they offered witnesses of their own. The Assistant United States Attorney who had prosecuted the case and numerous agents of the Bureau of Narcotics and the

F.B.I. testified that they knew of no incidents of electronic surveillance involving any of petitioners other than the two revealed in the United States Attorney's letter, apart from the Waldorf-Astoria occasion (*e.g.*, R. 4197, 4201-4202, 4266, 4303, 4607; see Pet. App. 40a).

Petitioners contend that the hearing was improperly restricted in that the trial judge did not require the government to summon additional witnesses. At the hearing on July 6, 1967, defense counsel submitted a tentative list of 37 witnesses whom they wished produced at government expense (R. 4233). Included were an employee of the Avis car rental agency, numerous narcotics agents and other government officials, the commanding officers of various army posts in Maryland, Georgia, North Carolina, and France, and members of the Georgia police (Pet. Br. A97-A99). The court required, as to most of the witnesses on the list, that an offer of proof be made as to the relevancy of their testimony. Petitioners submitted a "statement of relevancy" on July 11 (Pet. Br. A100-A104). After reading it, the court refused petitioners' request to be allowed to call these witnesses and characterized petitioners' proposal as a "grandiose fishing expedition" (R. 4358-4365). At various points in the hearings, the court did order the government to produce certain agents on the list (*e.g.*, Matuozzi and Schrier).[39] In response to the court's suggestion,

[39] Matuozzi was the chief enforcement agent of the Bureau of Narcotics for the Southern District of New York. He was in Atlanta at the time of the car surveillance, but did not actually participate in the attempted monitoring. He

the government called as witnesses agents Fitzgerald [40] and Swinney and Assistant United States Attorney Tendy, who had prosecuted at the trial, all of whom were on petitioners' list. In view of the conclusive nature of the showing made by the government that, apart from the Waldorf-Astoria occasion, no electronic surveillance of petitioners other than the two admitted incidents had occurred, and that, as to those, nothing relevant was obtained, the district judge was clearly justified in refusing to permit petitioners to summon additional witnesses whose pertinence to the inquiry had not and has never been satisfactorily explained.

In sum, the breadth of the hearing conducted by the trial judge was more than sufficient to accord petitioners the "opportunity * * * to prove that * * * the case against [them included] a fruit of the poisonous tree" (*Nardone* v. *United States*, 308 U.S. 338, 341). The government's proof was so overwhelming that not even "sophisticated argument" could show a "causal connection between information obtained through illicit [electronic surveillance] and the Gov-

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testified he was told by other agents that nothing was heard during the surveillance and that the device did not function (R. 4595, 4609-4610). Schrier was a supervisor with the Bureau of Narcotics office in New York. He testified, *inter alia*, that no electronic surveillance of petitioners, other than the three incidents enumerated, had occurred.

[40] Fitzgerald was the Bureau of Narcotics agent in charge of the squad which conducted the investigation leading to the prosecution of petitioners. He testified that he knew of no electronic surveillance of petitioners other than the incidents enumerated (R. 4296, 4304).

ernment's proof" at trial *(ibid.)*. Indeed, the hearing conducted, while confined by the trial judge to something less than a "grandiose fishing expedition," illustrates the extent of judicial resources which may be consumed in the pursuit of even clearly groundless claims of taint arising from instances of electronic monitering. Plainly, there is neither need nor occasion for this Court to consider further what has already been so thoroughly canvassed below.

IV. PETITIONERS' OTHER CONTENTIONS ARE INSUBSTANTIAL.

In addition to the foregoing arguments, petitioners present various other contentions which were rejected by the court of appeals and which they did not discuss in the petition for a writ of certiorari but "preserved" in the event that certiorari was granted. We assume that the Court's grant of certiorari in the present case was directed principally, if not entirely, to the question whether the *Katz* rule should be given retroactive effect, and perhaps as well to the issues concerning the validity of the electronic eavesdropping under pre-*Katz* decisions and the scope of the remand hearing. Accordingly, we treat the remaining points discussed in petitioners' voluminous brief summarily. All of those points relate either to the sufficiency of the evidence or to discretionary determinations made by the district court. All were thoroughly considered by the court of appeals, and are lacking in substantial merit. In no event, considered individually or collectively, do they warrant reversal of petitioners' convictions.

A. *Admission of the Waldorf-Astoria tapes was proper.*

1. Prior to the introduction of the tape recordings of the Nebbia-Desist and Nebbia-LeFranc conversations at the Waldorf-Astoria, the trial judge conducted an extensive, two-day voir dire examination of the tapes (R. 387-547). The conversations, which had been simultaneously monitored and tape-recorded by narcotics agent Kiere, were in French. The trial judge (Judge Palmieri) was fluent in French (R. 409), as was agent Kiere (R. 372-373). Defense counsel were assisted at the hearing by two French-speaking associates, Messrs. Raffin and Bernstein (see R. 405-412). At the hearing the tapes were played, copies of the transcripts (in English) prepared by agent Kiere were furnished to defense counsel, and defense counsel were allowed to make their own copies of the recordings (See R. 542-552). The trial judge found that many portions of the tapes were "abundantly clear * * * and there cannot be any possible doubt as to what the parties were saying" (R. 515). Although the court also found that certain passages were unintelligible, he declined to hold the entire tapes inadmissible for this reason. They were played for the jury after agent Kiere testified to the parts of the conversations he recalled overhearing (R. 553-627).

The procedure followed was unexceptionable. The question whether to admit the tapes was one calling for an exercise of the trial court's discretion. All the considerations which might argue against their admission were fully explored. The fact that certain segments of the tapes were not intelligible did not

render the tapes as a whole incompetent as evidence. *E.g.*, *Monroe* v. *United States*, 234 F.2d 49 (C.A. D.C.), certiorari denied, 352 U.S. 873; see *Johns* v. *United States*, 323 F.2d 421 (C.A. 5). Petitioners' further objection (Pet. Br. 128) to one of the tapes which had been processed through a noise suppressor is likewise without merit. *E.g.*, *Fountain* v. *United States*, 384 F.2d 624 (C.A. 5), certiorari denied, April 1, 1968, No. 1109, 1967 Term.

2. Petitioners' principal contention, however, appears to be that the trial judge erred in failing to appoint an outsider as translator to ensure that a wholly impartial translation of the tapes was made. As the record shows, the trial judge attempted to work out with counsel a procedure for translation of the tapes which would be both fair and acceptable to all parties. The basis of the procedure settled upon was agent Kiere's translation, prepared after extensive replaying of the original and filtered tapes (R. 398). The system initially followed at the hearing was to play and replay every word on the tapes in an effort to reach agreement on the correct meaning (see R. 408-459). Thereafter, defense counsel declined to attempt to reach agreement on a translation, preferring to rely on their right to cross-examine Kiere at the trial (see R. 504-506). The tapes were then played for their benefit and they were permitted to make copies for use during the trial (R. 536-538).

The procedure adopted and the refusal to appoint a different translator were not prejudicial. Petitioners were permitted to, and did, exercise their right

to cross-examine Kiere as to his translation (*e.g.*, R. 732-741). They could have called their own expert to seek to attack Kiere's translation had they deemed the effort worthwhile. As the court of appeals succinctly put it, "[u]nder the adversary system the Government was allowed to use its agent as an expert witness" (Pet. App. 21a). The unfairness which petitioners urge is, as the court below stated, "illusory" *(ibid.)*.

3. Petitioners contend that the "climax of unfairness" (Pet. Br. 160) occurred when the trial judge referred in the jury's presence to a written "word for word translation" (R. 570) of the tapes which agent Kiere looked at occasionally while translating the tapes for the jury. This remark, however, was prompted by defense counsel's objections (R. 566, 569) which, the court accurately indicated, implied that the witness was looking at something improper (R. 571, quoted at Pet. Br. 99). In fact, the transcripts had been supplied to Kiere for use as a guide to indicate the appropriate places to stop the tape in order to allow him to translate a complete segment (R. 565-566). The jury had been apprised of the existence and nature of the transcripts from Kiere's earlier testimony (R. 378).

4. Petitioners also argue (Pet. Br. 130-133) that there was insufficient evidence as to the identity of the respective speakers whose voices were recorded on the tapes. However, at the same time that agent Kiere was monitoring the conversations taking place in room 1602 of the Waldorf-Astoria Hotel, another

agent (Smith) was present with binoculars in a room at the adjacent Park-Sheraton Hotel where he could observe the occupants of petitioner Nebbia's room. Smith testified that the individuals in the room at the time of the conversations of December 16 and 17, 1965, were, respectively, Nebbia and Desist, and Nebbia and LeFranc (R. 362-367).[41] In addition, the identity of petitioners as the speakers was confirmed by their subsequent actions conforming to the plans they discussed in the tape recordings. Thus, for example, it was shown at the trial that Desist flew to Rochester from New York before his trip to Georgia, precisely as the voice attributed to him had been overheard telling Nebbia (see R. 558, 574-576). Thus, the evidence as to identity was clearly sufficient.[42]

5. Petitioner Nebbia raises a separate contention (Pet. Br. 158-161) that he was denied a fair trial by the trial court's statement during the charge to the jury that "I don't think you should have too much trouble finding that one of the voices was Nebbia's" (R. 2372). This statement, however, was made almost immediately after the court's admonition to the

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[41] The fact that one Alriq testified that Desist was with him at the time of the December 16 conversation only raised, as petitioners recognize (Pet. Br. 131), an issue for the jury. The circumstance that the agents did not follow Desist to Rochester hardly has the probative force which petitioners attribute to it (Pet. Br. 131-133), and the significance of this, if any, was similarly a matter for the jury.

[42] The agents' physical surveillance of the trip of Nebbia and LeFranc to Atlanta from Kennedy Airport on December 18, 1965, was prompted by Nebbia's statements to Desist on December 16 (R. 957-959; see R. 559).

jury that they, not he, were the finders of fact *(ibid.)*. Moreover, after objection by defense counsel, the court gave a supplemental instruction at the end of his whole charge (R. 2462-2464), explaining that the two or three occasions in his instructions in which he stated that the jury "should have no trouble reaching some conclusion" were not intended to impinge upon the jury's "exclusive fact-finding function." In addition, the court further charged: "I made a comment when I said you should not have any difficulty. When I made that comment, I was doing something that I have the privilege of doing as a Judge of this court, but I also charge you with all the emphasis at my command that you are the exclusive judges of the facts, not I. You will decide what is easy to determine and what is not easy to determine, and I am not to decide it" (R. 2463-2464). Accordingly, since the jury's function was clearly spelled out, there was no impropriety in the court's comment.

B. *The evidence was sufficient to support the jury's finding that petitioners Dioguardi and Sutera knew that the narcotics had been imported.*

1. Petitioners Dioguardi and Sutera argue (Pet. Br. 135-140) that there was not sufficient evidence to show that they knew the heroin they were negotiating to buy was imported, rather than domestic, merchandise. The totality of the circumstances, however, provided ample basis for such an inference. Dioguardi and Sutera flew to New York from Miami for the sole apparent purpose of meeting a man with a French name, a pronounced French accent, and a French ap-

pearance and demeanor,[43] to negotiate the purchase of a huge quantity of pure heroin which the Frenchman promptly told them was "here already"—referring, as the context made perfectly clear, to Atlanta, Georgia[44] (R. 1015-1019, 1053-1066, 1137-1151, 1428). When a Frenchman in New York says something is "here"—referring to a place over 700 miles and eight States away—the reference cannot be understood as denoting anything other than the United States. The conclusion is inescapable that he was referring to something which had been brought into this country. Moreover, it should be noted that the reference occurred while the Frenchman and the two Americans were making arrangements—in an atmosphere of mutual mistrust—for a clandestine, nighttime transfer of "merchandise"[45] which the Frenchman noted was "risky business" and which he said he would be "much relieved" to have over (R. 1060-1064, 1141-1143). In such transfers in the past, he stated, "people have been betrayed" and even "lost" (R. 1062-1063, 1141). Both LeFranc (R. 1061) and Dioguardi (R. 1060) stressed the need to be careful. Thereafter, in returning to the motel where he and

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[43] LeFranc's appearance and manner was such as to prompt Desist to assure Conder that he would recognize LeFranc as a Frenchman (R. 63).

[44] Dioguardi and Sutera knew that LeFranc had never been to Atlanta, and told him he would find it a much cleaner city than New York (R. 1057). They also told him he would enjoy Miami (*ibid.*).

[45] "Merchandise" is a euphemism for "heroin" (see R. 1062, 1140-1141).

Sutera had registered under assumed names, Dioguardi made efforts to assure that he was not being followed (R. 1150-1151, 1361-1367). The jury was amply justified in finding that Dioguardi and Sutera had "actual knowledge that the drugs were illegally imported from abroad," as the court had instructed they had to find to convict (R. 2308).

2. Petitioners' arguments concerning the general sufficiency of the evidence (Pet. Br. 138-140, 161-162) border upon the fanciful. As to petitioners Dioguardi and Sutera, there appears to be no need to elaborate upon the discussion of the point by the court below (Pet. App. 9a-11a). As to petitioners Desist, LeFranc, and Nebbia, "the mass of evidence against [them]," the court of appeals noted, "does not warrant discussion as to its sufficiency" (Pet. App. 11a).

C. *There was no error in the trial court's handling of a request by the jury, after it had retired to consider its verdict, to hear the testimony of two government agents concerning conversations overheard at Adano's restaurant.*

After the jury had retired to consider its verdict, it sent a note to the trial judge stating (R. 2510): "We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar of Adano's restaurant." These agents had testified to the critical conversations on the night of December 17, 1965, between petitioners Dioguardi, Sutera, and LeFranc at the bar in the Manhattan restaurant (R. 1056-1066, 1138-1144, described *supra*, pp. 5-6, 75). After some colloquy with counsel, the court permitted much of the agents' testimony to be read to the jury.

However, he refused petitioners' request that there also be read the bulk of the agents' cross-examination, dealing mainly with their ability to overhear the conversations, ruling that this was not the agents' "testimony as to what was overheard" (R. 2514). As the court of appeals concluded (Pet. App. 32a), interpretation of the jurors' note was a matter for the exercise of the trial judge's discretion. The court's construction of that note was reasonable and was not an abuse of discretion.

D. The refusal of the trial judge to appoint for petitioner Nebbia a French interpreter who would simultaneously translate the proceedings at trial was not an abuse of discretion, in light of the fact that Nebbia admittedly had funds to procure his own translator and had the assistance of French-speaking counsel.

Petitioner Nebbia contends (Pet. Br. 148-158) that he had a constitutional right to the appointment during the trial of a personal interpreter, without expense by him, although he himself was well able to pay for that service. This argument is discussed at considerable length and rejected in the opinion of the court of appeals (Pet. App. 25a-30a).

Petitioner Nebbia is a Frenchman who at the time of trial could neither speak nor understand English to any appreciable extent. On January 28, 1966, he had furnished cash bail of $100,000 (R. 2697-2698). See *United States* v. *Nebbia*, 357 F.2d 303 (C.A. 2). Nebbia was represented at trial by the New York City firm of Lewy, Rosoff & Stern, all of the partners of which, as listed in the 1966 edition of the Martin-

dale-Hubbell Law Dictionary, are fluent in French.[46] The firm had been requested to represent Nebbia by the French Embassy (R. 2586). Also available to Nebbia at trial, as a means of obtaining an understanding of the proceedings against him and to assist counsel in his defense, was the presence of his bilingual co-defendant LeFranc, with whom he was incarcerated, and LeFranc's bilingual Paris attorney (Mr. Raffin), who was present throughout the trial.

Nebbia's counsel first demanded that the court furnish Nebbia with a French translator at a pre-trial conference on April 27, 1966 (R. 3181-3183). When the court inquired why Nebbia could not "retain an interpreter" (R. 3181), defense counsel, after some colloquy, stated that "it occurred to [him] that if [Nebbia] chose not to advance the money a problem of due process would be presented" (R. 3182). Counsel later informed the court that Nebbia "declined to allow [him] to incur the expense" of obtaining a simultaneous translator (R. 3365). Counsel thereafter made clear to the court that his application for an interpreter was not predicated upon "grounds of poverty or indigence" but upon "constitutional rights" (R. 3368-3369). The trial judge denied the application (R. 3369-3370), having indicated that he could find no "justification for a request by a non-indigent defendant represented by able counsel, privately paid

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[46] Mr. Stream, who actually appeared for Nebbia at trial, apparently became a member of the firm shortly before the notice of appearance was filed (on January 14, 1966). He represented to the district court that he was not fluent in French (R. 1603).

for, to get from the Government the services of a simultaneous translator" (R. 3365-3366). No interpreter was furnished by the government at trial (nor hired by petitioner), and Nebbia relied upon that fact as the basis for unsuccessful motions to dismiss the indictment at the close of the government's evidence (R. 1599-1603) and of all the evidence (R. 1949), and to set aside the verdict (R. 3870-3873).

The trial court's refusal to appoint an interpreter, in these circumstances, was correct. Apart from one State case,[47] we are aware of no American authority holding that a non-indigent, non-English-speaking defendant is constitutionally entitled to the appointment of an interpreter at government expense at trial (see Pet. App. 25a-26a, for discussion of the federal cases bearing on the issue). As the court of appeals found (Pet. App. 27a-28a):

> [I]f the real point is guarantee of a fair trial, it is a little difficult to see why Nebbia is not required to lie in the bed that he made. We are aware that trying a defendant in a language he does not understand has a Kafka-like quality, but Nebbia's ability to remedy that situation dissipates substantially — perhaps completely — any feeling of unease. In other words, if Nebbia denied himself the interpreter and stands on his right to do so, does not the issue become solely who should have paid for one? Moreover, we doubt that Nebbia's claimed absolute constitutional right to an interpreter is stronger than the absolute right to a court-appointed counsel; the latter is held only by the indigent, *Gideon* v. *Wainwright*, 372 U.S. 335, 339-340 (1963) * * *.

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[47] *State* v. *Vasquez*, 101 Utah 444, 121 P.2d 903.

Nor did the trial judge abuse his discretion in refusing to appoint an interpreter. The court indicated (R. 1599) that he had observed Nebbia in conversation with his trial counsel "on many occasions" and had "no doubt" that Nebbia had been sufficiently in communication with him to permit a vigorous and able defense to be conducted. Also available to assist him, as we have pointed out, were the French-speaking partners of Nebbia's counsel and LeFranc's bilingual counsel. Even assuming, as petitioner argues, that the trial judge had authority at the outset of the trial to appoint an interpreter for Nebbia under the then-promulgated but not yet effective Rule 28(b) of the Federal Rules of Criminal Procedure, the failure to do so in these circumstances was not error.[46] In any event, the authority granted under Rule 28(b), assuming its relevancy here, is, by its very terms, discretionary.

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[46] Petitioner's arguments concerning F.R.Crim.P. 28(b) are adequately answered in the court of appeals' opinion (Pet. App. 28a-29a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the requirement first announced in *Katz* v. *United States*, 389 U.S. 347, should not be applied retroactively, that none of the other points raised by petitioners warrant reversal of their convictions, and that the judgment of the court of appeals should accordingly be affirmed.

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